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No.

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1984

ROSE HALL LIMITED,
Petitioner

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION OF ROSE HALL LIMITED FOR A WRIT OF CERTIORARI

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Petitioner Rose Hall Limited respectfully asks that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

QUESTIONS PRESENTED FOR REVIEW

1. Do the provisions of the Federal Reserve Act, 12 U.S.C. §§ 601-32, and the regulations adopted thereunder, permit an "Edge corporation" organized under those provisions to interpose the separate corporate existence of a wholly owned subsidiary to avoid the imposition of responsibility for a wrong committed in its foreign banking operations?

2. Do the equitable duties to creditors enunciated in *Pepper v Litton*, 308 U.S. 295 (1939), and *Federal Deposit Insurance Corp. v. Sea Pines Co.*, 692 F.2d 973 (4th Cir. 1982), here permit an Edge corporation to interpose the separate corporate existence of a wholly owned subsidiary to defeat a third party's collection of a judgment for the subsidiary's wrong, after the subsidiary was made judgment-proof by distributing its assets to affiliated corporations despite the third party's known claim?

3. Does the doctrine immunizing participants in judicial proceedings from damage liability for their conduct, enunciated in *Briscoe v. Lahue*, 460 U.S 325 (1983), extend so far as to prevent deception of a court from providing a basis for piercing the corporate veil to hold an Edge company responsible for its subsidiary's wrong when — the deception defeated an injunction of the subsidiary's wrong by leading the court to conclude that damages would be an adequate remedy against the subsidiary, and the subsidiary was thereafter rendered judgment-proof by stripping it of assets pursuant to a plan in existence at the time of the injunction proceedings?

Parties Below: Petitioner Rose Hall Limited was plaintiff in the district court and appellant/cross-appellee in the court of appeals. Rose Hall Limited is a wholly

owned subsidiary of Rollins Jamaica Limited which is, in turn, wholly owned by an individual. Respondent Chase Manhattan Overseas Banking Corporation was defendant in the district court and appellee/cross-appellant in the court of appeals. The only other party below was Holiday Inns, Inc. which, petitioner believes, has no interest in the outcome of this petition.

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Reported Opinions below: The opinion for which this petition seeks review is *Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp.*, 576 F. Supp. 107 (D. Del. 1983), *aff'd on op. below* (3d Cir. July 13, 1984), *reh'g denied* (3d Cir. Aug. 14, 1984) (hereinafter the "Opinion" or "Opinion below") (A-3-129) [The Appendix to this petition is thus cited throughout]. Three other similarly

captioned opinions are at 566 F. Supp. 1558 (D. Del. 1983), 93 F.R.D. 858 (D. Del. 1982), and 494 F. Supp. 1139 (D. Del. 1980).

Jurisdiction Of This Court: This petition seeks review of the July 13, 1984 Judgment Order of the United States Court of Appeals for the Third Circuit in *Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp.*, No. 83-1845 (A-1). On July 27, 1984, Rose Hall timely petitioned for rehearing, which was denied by Order of August 14, 1984. This Court has jurisdiction under 28 U.S.C. §1254(1).

Statutes, Ordinances, and Regulations: This case involves 12 U.S.C. §§601, 611 and 632, Federal Reserve Board Regulations M, 12 C.F.R. §213.104 (1973-79), and K, 12 C.F.R. §211.7 (1980). These materials are printed in the Appendix.

STATEMENT OF THE CASE

The jury below determined that a foreign bank's foreclosure sale of plaintiff's collateral was wrongful, causing $6 million of damage. The findings involved in that determination have been sustained by the courts below. However, those courts rejected several grounds rooted in federal law, and a related jury finding, for holding the defendant, which was the foreign bank's parent company, liable for the wrongful sale by the foreign bank, which was stripped of its assets and made judgment-proof following the sale.

The foreign bank is Chase Merchant Bankers Jamaica, Ltd., a Jamaican company ("Chase Jamaica"). The defendant, which owned all Chase Jamaica's stock, is the respondent Chase Manhattan Overseas Banking Corporation ("CMOBC"), which is in turn a wholly owned subsidiary of Chase Manhattan Bank N.A ("Chase"). CMOBC is an "Edge Act" corporation, chartered under the Federal Reserve Act, 12 U.S.C. §§601 *et seq.*

An Edge corporation such as CMOBC is authorized to engage in foreign banking, either through branches or subsidiaries. Under 12 U.S.C. §632, all suits against such corporations "arising out of . . . international or foreign operations, either directly or through the agency, ownership, or control of branches or local institutions . . . shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits . . ."

The plaintiff below is the petitioner here, Rose Hall Limited ("Rose Hall"), a Cayman Islands company. Rose Hall is wholly owned through another company by an individual who resides in Delaware.

Federal jurisdiction in the court of first instance below, the United States District Court for the District of Delaware, was founded on 12 U.S.C. §632. Alternatively, it was based on 28 U.S.C. §1331, because the action arose under federal statutory and regulatory provisions governing the foreign banking operations of Edge companies, as well as on 28 U.S.C. §1332, because Rose Hall is a foreign corporation while CMOBC's home office is in Newark, Delaware.

In 1976, Rose Hall was in default on a loan of approximately $3 million from Chase Jamaica, which held as security a mortgage on 3,000 acres of Rose Hall's land and a pledge of all the stock of Rose Hall's wholly owned subsidiary, Rose Hall (H.I.) Limited ("Rose Hall (H.I.)"). Rose Hall (H.I.) owned a hotel which was under long-term lease to a subsidiary of Holiday Inns, Inc. ("Holiday Inns") (3318a) [The Appendix to the brief in the third circuit is thus cited throughout]. Rose Hall arranged a sale of the hotel property without the 3,000 acres, at a price which would have netted for the seller substantially more than the Chase Jamaica debt, but that sale aborted because of wrongful interference of Holiday Inns, which was maneuvering for relief from the terms of its subsidiary's lease of the hotel (A-6-7). Chase Jamaica then foreclosed, by an unadvertised private sale, on all the Rose

Hall collateral, including the 3,000 acres, to Urban Development Corporation ("UDC"), an agency of the Jamaican government (3462a), at a net price which was the precise amount of Rose Hall's debt (2043a; 3550a; 3951a).

When the Chase Jamaica collateral sale was first threatened, Rose Hall filed suit in the Supreme Court of Judicature of Jamaica to enjoin the sale as involving a grossly inadequate price (3480a). Chase Jamaica resisted an application for a preliminary injunction by arguing that, because Rose Hall itself had the collateral up for sale, money damages would provide an adequate remedy (3494a). When the future ability of Chase Jamaica to respond to money damages was questioned, it was represented to the Jamaican court, through the testimony of a witness and the argument of counsel, that Chase Jamaica had no plans to shut down and that it was and would remain able to respond to damages because of its substantial assets and the backing of its parent company. The injunction was denied on the ground of the adequacy of money damages, and Chase Jamaica's sale of the collateral proceeded.

Promptly after completing the sale, Chase Jamaica was closed and made judgment-proof by a distribution of its assets in payment of indebtedness to affiliated corporations, primarily to Chase, the grandparent corporation (1385-88a; 3551a; 3564a; 3577a; 3578a). This was done notwithstanding that in the injunction proceedings the Jamaican court was told, according to the testimony below of Rose Hall's barrister in those proceedings (1612a):

> . . . that the defendant [Chase Jamaica] was part of a great organization of bankers, that its present revenue position was a temporary situation, that it intended to continue in business and its position would, in fact, improve, that it would have the backing of its overseas parent company, and that for this reason or for these reasons *there was absolutely no danger* of

> the plaintiff being faced with a position in which he could not recover damages. [Throughout this petition, unless otherwise noted, emphasis in quoted matter is added.]

Chase Jamaica's own barrister confirmed in testimony below that "the gist of the presentation" before the Jamaican court had been that "the situation was such that the court really ought not to entertain any doubt about [Chase Jamaica's] ongoing solvency" (2442a). Evidence adduced at trial below showed that when the Jamaican court was given this advice, plans to close and empty Chase Jamaica were in place (3518a).

Simultaneously with its Jamaican suit Rose Hall also brought suit in the state courts of Georgia against Holiday Inns and a Georgia resident who was its agent in these matters, seeking damages for the wrongful interference with Rose Hall's earlier proposed sale of the hotel for more money (1323a; 5173a). That suit was ultimately dismissed because the subject of that proposed sale had been the hotel itself, rather than the stock of Rose Hall (H.I.) which owned the hotel, so that the interference cause of action was owned by Rose Hall (H.I.), and not its parent, Rose Hall (1324a; 3954a).

Chase Jamaica caused that loss of the interference claim (A-63-64). At the outset of the Georgia action, Rose Hall had urged Chase Jamaica, which then still controlled Rose Hall (H.I.), to authorize the use of the name of Rose Hall (H.I.) as plaintiff, or to cast that part of its collateral sale in the form of a sale of the hotel asset rather than of the Rose Hall (H.I.) shares, so that Rose Hall (H.I.), with the interference claim, could be preserved for Rose Hall (1313-17a). However, Chase Jamaica insisted on a sale of the Rose Hall (H.I.) shares and 3,000 acres (A-8)—thus throwing away the interference claim. UDC had no interest in the claim against Holiday Inns (1671a), and paid no value for it (2138a).

In April, 1979, after appeals in the Georgia courts had run their course, Rose Hall brought suit below in the United States District Court for the District of Delaware against CMOBC.[1] After filing the Delaware suit, Rose Hall sought from the Jamaican court a stay of the damage phase of that action (3504a). In resisting that stay, Chase Jamaica tendered to the court an undertaking of CMOBC, which was not itself subject to jurisdiction in Jamaica, to assume some responsibility for any judgment against Chase Jamaica (1400-02a; 3898a; 4286a). However, the Jamaican court concluded the undertaking was "hedged and bristled with such a condition that it makes what is proffered as worthless" and that the offering of it "shows signs that it was more calculated to obstruct the course of justice than to achieve it" (A-151). In staying its damage proceedings, the Jamaican court found that a damage judgment against Chase Jamaica would be meaningless (A-147-148) and approved Rose Hall's pursuit of CMOBC under American law (A-146-148).[2]

In the Delaware case, Rose Hall asserted that CMOBC could be held liable for Chase Jamaica's wrongful sale of the collateral on several grounds, under the federal law made applicable by the provision of 12 U.S.C. §632 that suits against Edge companies "shall be deemed to arise under the laws of the United States" (p. 3,

1. Holiday Inns was also named as a defendant. However, the court below determined preliminarily that the interference claim was *res judicata* under the Georgia judgment, and on the other claim asserted the jury found Holiday Inns had not conspired with Chase Jamaica concerning its sale of the collateral.

2. CMOBC conceded below by silence that its control of and involvement in the Jamaican stay proceedings bind CMOBC by collateral estoppel to the Jamaican court's decision that there remained no meaningful remedy for Rose Hall in Jamaica (*See* Dkt. 868, pp. 76-77). *Restatement (2d) of Judgments* §39. That decision, and a similar decision in Delaware (1175-76a), caused the case to be tried to conclusion in Delaware, at vast expense, because courts of both nations held it should be.

supra). The courts below acknowledged, in a sense, the applicability of United States law, although they failed in the end to apply it. The district court said, "the liability of CMOBC, as a stockholder, for the wrongs of its subsidiary is governed by the laws of the United States" (A-24) and, on another occasion, "the United States has a significant policy interest in the application of its law" as to "liabilities of Edge Act corporations" (A-137).

After a lengthy trial, the issues were put to the jury by special interrogatories under Rule 49(a) of the Federal Rules of Civil Procedure. The jury specifically found (a) that Chase Jamaica had breached its duty to Rose Hall in the sale of the collateral; (b) that Holiday Inns had wrongfully interfered with Rose Hall's sale of the hotel and that Chase Jamaica's wrong had deprived Rose Hall of its remedy against Holiday Inns; and (c) that Rose Hall's resulting damages were $6 million (A-11-12).[3]

The jury also found, "Chase Jamaica, through its representations, as a result of its control by CMOBC, [did] deceive the Jamaican court into not enjoining the sale of the collateral" (A-12) — in which event, the court had instructed the jury, "the corporate separateness of the no longer financially substantial subsidiary could [not] be used to defeat Rose Hall's claim" (A-36, n.27). On the basis of the jury's verdict, a judgment was initially entered in favor of Rose Hall against CMOBC for $6 million plus interest.

Upon motion for judgment notwithstanding the verdict, a successor judge (the trial judge having become disabled after the verdict), while upholding the jury's findings concerning Chase Jamaica's wrongful conduct, overturned the judgment on the ground that CMOBC could not be held liable. In so ruling, the court extended

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3. In addition, the jury found that CMOBC had not controlled Chase Jamaica's actions in selling the Rose Hall collateral, but this was after a special instruction, in response to a question, that CMOBC's "control in the general (or overall) sense may be, but is not necessarily, relevant . . . " (A-50, n.46).

the principle of *Briscoe v. Lahue*, 460 U.S. 325 (1983), by holding that the immunity there involved foreclosed the piercing of the corporate veil, to hold a parent corporation liable for its subsidiary's wrong, on the basis of a court's deception in preliminary injunction proceedings. Moreover, in its ruling, the court did not follow the teachings of *Pepper v. Litton*, 308 U.S. 295, 306-13 (1939), and *Federal Deposit Insurance Corp. v. Sea Pines Co.*, 692 F.2d 973 (4th Cir. 1982), that a parent corporation can be held responsible for the liability of its subsidiary when, as here, the subsidiary has been depleted of assets by payment of indebtedness to affiliated corporations with knowledge of the third party's claim. In addition, the court repeated an earlier ruling that the provisions of the Federal Reserve Act and regulations, contemplating an Edge corporation's control of its foreign banking activities whether conducted by a branch or a subsidiary, do not themselves make the Edge parent company responsible for the wrong of its subsidiary; rather, the court ruled, those provisions only give rise to a presumption which can be rebutted by a showing that the Edge company had not actually exercised the control of its subsidiary called for by the statute and regulations. The Court of Appeals for the Third Circuit affirmed those rulings on the basis of the district court opinion.

ARGUMENT

I. THE DECISIONS BELOW DISREGARD THE IMPORTANT FEDERAL POLICY MAKING "EDGE ACT" CORPORATIONS RESPONSIBLE FOR THEIR FOREIGN BANKING OPERATIONS NO MATTER WHETHER CONDUCTED THROUGH A BRANCH OR A SUBSIDIARY.

CMOBC was organized in 1962 under §25(a) of the Federal Reserve Act (2268a). That Act, as amended by the Edge Act of 1919, authorizes formation of "Edge cor-

porations" to pursue international banking from a head office in the United States, through subsidiary corporations and/or branches. 12 U.S.C. §§601-32. The Act expressly contemplates the Edge corporation, not as a passive holding company, but as an operating company which is itself engaged in the international banking. For example, an Edge company is authorized to be formed only "for the purpose of *engaging in* international or foreign banking . . . either directly or through the agency, ownership, or control of local institutions in foreign countries." 12 U.S.C. §611.

Not only is CMOBC part of the United States banking system, but so is Chase Jamaica. Consent of the Federal Reserve Board is required to establish a subsidiary such as Chase Jamaica (PX3), and general control of the overseas operations by the Edge corporation is specifically contemplated, whether they are conducted through a branch or a subsidiary. Thus, Federal Reserve Board regulations spell out a duty "to supervise and administer" the "operations" of "subsidiaries" of Edge corporations and to establish appropriate "controls" for that purpose. Regulation M, 12 C.F.R. §213.104, in effect from 1973 through 1979, (A-159-61) provided:

> (b) [T]he Board believes it incumbent upon member banks [Edge companies] to *supervise and administer their* foreign branches and *subsidiaries* in such a manner as to assure that their operations are conducted at all times in accordance with high standards of banking and financial prudence.
>
> (c) Proper administration and supervision of foreign branches and subsidiaries require the use of effective systems of records, controls and reports. . . . At a minimum, such systems should provide the following:
>
> * * *
>
> (4) *Controls* . . . Such reports should cover . . . (iv)

> conformance to head office guidelines on loans, . . . (v) compliance with local laws and regulations; and (vi) compliance with *applicable U.S. laws and regulations*.

Similar provisions exist today. *See* Regulation K, 12 C.F.R. §211.7 (1980) (A-162-164). Indeed, the subsidiary form has been used for overseas operations of Edge corporations only "where legal impediments precluded the establishment of direct branches. In these cases, the subsidiaries are pure substitutes for branches and are for the most part operated as if they were branches." Dahl, "International Operations of U.S. Banks," *Law & Contemporary Problems* 100, 111 (Winter 1967).

That the statute and regulations contemplate an Edge corporation's responsibility for its foreign operations is specifically reflected in 12 U.S.C. §632 (A-155). It expressly applies to make U.S. law govern and to confer jurisdiction on U.S. courts as to foreign banking transactions of Edge corporations conducted through a branch or through the "ownership, or control . . . of local institutions":

> Notwithstanding any other provision of law, *all suits* of a civil nature at common law or in equity *to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking*, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, *either directly or through the agency, ownership, or control of branches or local institutions* in dependencies of insular possessions of the United States or in foreign countries, *shall be deemed to arise under the laws of the United States, and the district court of the United States shall have original jurisdiction* of all such suits.

The courts below disregarded the full significance of these provisions. They ruled that §632 "is simply a jurisdictional provision" and merely "provides Rose Hall a forum to determine if the circumstances warrant a finding of whether the separate corporate status of CMOBC and Chase Jamaica should be disregarded" (A-106; A-107). Such a view seems excessively narrow, since jurisdiction to apply conventional tests concerning piercing the corporate veil surely exists wholly apart from §632. 13 Wright, Miller & Cooper, *Federal Practice & Procedure* §3624 (Cumulative Supp. 1980).

More broadly, the courts below ruled the regulatory requirement that Edge companies "supervise and administer their foreign branches and subsidiaries in . . . their operations" is not a requirement "tantamount to control" but "simply serves an informational and regulatory purpose to ensure the financial health of the Edge Act corporation" (A-103). This approach hardly serves the policy underlying the Act and regulations, in that the rulings permit the Edge corporation to escape liability for foreign operations by showing that it failed to fulfill the responsibility of controlling those operations, which the Act and regulations vest in the Edge company.

The ultimate issue is whether the U.S. courts in their rulings should encourage conformity with such federal regulatory policies. This in turn involves consideration of the question whether the federal regulations here mean what they say in providing that Edge companies shall "supervise and administer their foreign branches and subsidiaries in . . . their operations" or whether Edge companies will be permitted on their own, by selecting the form in which they conduct foreign operations, to determine if they are to have responsibility for those operations. In the light of the burgeoning off-shore activities of American banks, this is a matter, we submit, calling for the definitive attention of this Court.

II. EQUITABLE PRINCIPLES APPLICABLE TO FEDERALLY CHARTERED BANKS PRECLUDE AN EDGE CORPORATION FROM ASSERTING LIMITED LIABILITY, WHERE ITS SUBSIDIARY WAS MADE TO DISTRIBUTE ITS ASSETS PREFERENTIALLY TO ITS OWN AFFILIATES AS CREDITORS, LEAVING NOTHING FOR AN OUTSIDE CREDITOR.

A. *The importance of the issues involved here warrants this Court's review*: Equitable disregard of corporate entities, while not lightly or routinely used, is an important power of the federal courts. It comes up here in a significant federal banking context, and questions about it are not rare in such federal contexts as taxation, securities litigation, bankruptcy, labor regulation railroad regulation and antitrust. *See Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.*, 417 U.S. 703 1974; *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398, 402-04 1960. The district court below has elsewhere pointed to the oft-noted need for clarification of this power. *See, eg., Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 839 (D. Del. 1978) (the cases are not "uniform or clear," but enveloped in "mists of metaphor" and there is "confusion in this area"). Clarifying this judicial power and its remedial flexibility, and correcting the injustice here, all merit this Court's attention.

The Opinion below sees nothing wrong in preferentially paying off affiliate debt and leaving Rose Hall remediless (A-40). By approving the Opinion, the third circuit (a) rejects *FDIC v. Sea Pines Co.*, 692 F.2d 973, 976 (4th Cir. 1982), *cert. denied*, ____U.S.____103 U.S.L.W. 3825 (1983), and *United Rubber Workers v. Great American Industries, Inc.*, 479 F. Supp. 216, 245-46 (S.D.N.Y. 1979), both of which recognize that fiduciary responsibilities forbid this, and (b) disregards this Court's applicable teachings in *Pepper v. Litton*, 308 U.S. 295, 306-13 (1939). See pp. 14-16, *infra*. If banks,

other federally chartered entities, and other corporations liable on disputed federal law claims can get away with preferentially emptying entities via "debt" to affiliates, defeating collection of valid but contested claims of outsiders, the signal to the world about our system of justice is plain.

B. *The stripping of Chase Jamaica made it gravely inequitable for CMOBC to assert limited liability*: On this issue the Opinion rejected Rose Hall's analysis, but recognized that "if one started with Rose Hall's statement of the issue . . . the American rule on witness immunity" does apply, holding that it "precludes this suit as presented" (A-34).[4] On any analysis of the equities here, the injustice of leaving Rose Hall remediless is plain and raw. Indeed, even CMOBC has not openly urged any court to stomach the idea that after the stripping of Chase Jamaica justice or equity permits leaving Rose Hall remediless; CMOBC has repeatedly suggested in Jamaica and

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4. There was confusion about choice of law below. The Opinion, laboring under its mistaken premise that Rose Hall's effort to disregard corporate entities was an effort to assert an "independent cause of action against" CMOBC (A- 52) for a tort consisting of the false testimony given in Jamaica, reasoned that Jamaican law would govern the existence of such a tort (A-24-25). There is no such issue, since Rose Hall's analysis has nothing to do with tort liability against witnesses or lawyers (pp. 21-23, *infra*). Assuming, *arguendo* and contrary to our view, that any subsidiary issue of Jamaican immunity law could be involved, that law is the common law. Jamaica is a British Commonwealth country, and appeals lie from its highest court to Her Majesty in Privy Council at London. Jamaican courts follow English common law and principles of equity (A27, n.22; 566 F. Supp at 1571n) -- which are the basis of our own jurisprudence, and do not differ from American law on any point material to this petition. United States immunity law is also the common law; in *Tower v. Glover*, ____U.S. ____, 81 L.Ed.2d 758, 765 (1984), this Court pointed out that "immunities in this country have regularly been borrowed from the English precedents . . ." and the Opinion below says "the rationale for the American [immunity] rule is largely the same as that for the English rule" (A-37). *See Briscoe v. Lahue*, 460 U.S. 325, 330-31 (1983).

below that it would pay a judgment rendered against Chase Jamaica in Jamaica. However, when the point was important in the Jamaican stay proceedings, CMOBC imposed conditions which made its commitment worthless (p. 6, *supra*).

This Court discussed the governing equitable principles in *Pepper v. Litton*, *supra*, holding that a controlling stockholder is a fiduciary whose "dealings with the corporation are subject to rigorous scrutiny," a "standard of fiduciary obligation designed for the protection of the entire community of interests in the corporation — creditors as well as stockholders" (308 U.S. at 306-07). The Court explained that in some cases "so-called loans or advances by the dominant or controlling stockholder will be subordinated to claims of other creditors and thus treated in effect as capital contributions by the stockholder," and that "these cases do not turn on the existence or non-existence of the debt" but "involve simply the question of order of payment" and, for such reasons, "at times equity has ordered disallowance or subordination by disregarding the corporate entity" (308 U.S. at 309-10).

Regardless of the degree of CMOBC's control over Chase Jamaica (pp. 27-30, *infra*), the "tests of honesty and justice" apply,[5] and they are conventionally articulated in the broad statement that entities are disregarded whenever it is necessary to prevent "fraud, illegality or injustice," *e.g.*, *Publicker Industries v. Roman Ceramics Corp.*, 603 F.2d 1065, 1069 (3d Cir. 1979); *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981), a formulation

5. In *N.L.R.B. v. Deena Artware, Inc.*, *supra*, 361 U.S. at 403, this Court approvingly quoted Justice Cardozo's statement elsewhere that "dominion may be so complete" as to create agency, and "where control is less than this, we are remitted to the tests of honesty and justice." Indeed, entities may be disregarded even where an entity inherently had *no* control — a subsidiary may be held responsible for acts of its parent. *See FMC Finance Corp. v. Murphree*, 632 F.2d 413, 422-23 (5th Cir. 1980).

consistent with the remedial flexibility most courts recognize.[6]

Thus, the district court's expression "remotely approaching fraud" (A-40) is inadequate; the test for disregard of entities is "fraud, illegality *or injustice*," in the context of CMOBC's fiduciary duty under *Pepper v. Litton*, *supra*. It should not matter whether the injustice to Rose Hall was "the aim or only the result of the arrangement." *Anderson v. Abbott*, 321 U.S. 349, 363 (1944).[7] For instance, *Texas Co. v. Roos*, 93 F.2d 380, 382-83 (5th Cir. 1937), disregarded entities where the subsidiary was inequitably emptied by a dividend, despite assertions that this was motivated by tax considerations, with no intent to defraud plaintiff. The court rejected

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6. Typical is *FMC Finance Corp. v. Murphree*, *supra*, 632 F.2d at 422 ("because the doctrine is essentially equitable in character, the conditions under which a corporate entity may be disregarded vary, depending upon the circumstances . . . It is therefore inappropriate to attempt to apply any verbalization of the test in a mechanical manner"). *Accord*, *Talen's Landing Inc. v. M/V Venture*, 656 F.2d 1157, 1161 n.6 (5th Cir. 1981) ("Although there are general rules . . . each case is *sui generis*"); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 684 (4th Cir. 1976) (same); *Edwin D. Williams & Co., Inc. v. Edwin K. Williams & Co. — East*, 542 F.2d 1053, 1063 (9th Cir. 1976) cert. denied 433 U.S. 908 (1977) ("There are no inflexible tests by which courts determine when to hold corporations liable for the acts of their subsidiaries . . . Each case must be considered on its own facts).

7. In *Anderson* this court said that "the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim *or only the result* of the arrangement." This teaching is not limited to legislative policies; regardless of the "aim," interposition of a corporation should not defeat *judicial* corrective powers described at pp. 19-21, *infra*, where the "result" of corporate arrangements is that a court's jurisdiction has been defeated, and a damaged plaintiff's normal remedy in that court has been destroyed. *Cf. Linn & Lane Timber Co. v. United States*, 236 U.S. 574, 577-78 (1915) (entities disregarded to defeat inequitable assertion of statute of limitations). Indeed, the "overriding public policy" this Court applied to disregard entities in *Bangor Punta*, *supra*, consisted of equitable principles governing rights among private parties.

this as "immaterial," holding that "both corporations are presumed to have intended to defraud [plaintiff] and defeat the payment of his claim," because "a person is presumed to intend the natural and probable consequences of his act." Moreover, in *Pepper v. Litton*, *supra*, this Court said that even absent the planned fraudulent scheme found there, the "dominant influence" in a company could not be allowed to "manipulate its affairs in such a manner that when one of its creditors came to collect her just debt the bulk of the assets had disappeared into another Litton company" (308 U.S. at 311-312).[8]

The Opinion's narrowly technical statement "that CMOBC did not in any way profit or receive any assets from the 'stripping' " (A-39) is similarly immaterial; it disregards the admitted fact that CMOBC's only purpose as to Chase Jamaica was "to do what the International Department of Chase Manhattan Bank, N.A. wants" (1439a), so that Chase Jamaica's repayment of millions to Chase served CMOBC's only real self-interest, as fully as if CMOBC received the assets itself.[9] Thus, in *FDIC v. Sea Pines Co.*, *supra*, the court disregarded entities because of a breach of "fiduciary duty by stripping the sub-

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8. In equity, fraud is "equitable fraud" which "includes *all* acts, omissions or concealments which involve a breach of a legal or equitable duty, trust or confidence justly reposed, and are injurious to another, *or* by which an undue or unconscientous advantage is taken of another," *McFadden v McFadden*, 139 A.2d 774, 776-77 (N.J App.) *cert denied*, 141 A.2d 828 (N.J 1958). The latter part of that test includes "constructive fraud," which "irrespective of moral guilt the law declares fraudulent," *Italo Petroleum Corp v. Hannigan*, 14 A.2d 401, 407-08 (Del. 1940).

9. Indeed, controlling parties having fiduciary obligations are not normally treated as disinterested in dealings involving their close relatives or affiliates. *See, e.g., Pension Benefit Guaranty Corp v. Greene*, 570 F. Supp 1483, 1493-94 (W.D Pa. 1983); *Sinclair Oil Corp v. Levien*, 280 A.2d 717, 723 (Del. 1971) ("Sinclair's act of contracting with its dominated subsidiary was self-dealing", although contract was formally with another subsidiary, not Sinclair itself).

sidiary of its assets, when it became insolvent, for the benefit of the parent," pointing out that those who control a failing corporation "become trustees for the creditors, and . . . cannot by transfer of its property or payment of cash, prefer themselves *or other creditors*" (692 F.2d at 977); *see Allied Chemical Corp. v. Randall*, 321 F.2d 320, 323 (7th Cir. 1963) (controlling individual liable, where debtor corporation stripped by transactions with his other corporations); *United Rubber Workers v. Great American Industries, Inc., supra*, 479 F. Supp. at 245-46 (parent or grandparent corporation may not use fiduciary position "to gain a preference over other creditors of its subsidiary", and intent to accomplish such a preference was "a fraudulent intent"). Here, because the emptying of Chase Jamaica gave affiliate "debt" such an illegitimate preference, it meets the test of being "unjust and fundamentally unfair" to Rose Hall under *Sea Pines*, justifying disregard of entities without more (692 F.2d at 978).

In the final analysis, it was CMOBC's liquidation of Chase Jamaica that destroyed Rose Hall's damages remedy against Chase Jamaica. *See* Powell, *Parent & Subsidiary Corporations* 85-86 (1931) ("If the parent corporation has caused the subsidiary to be removed from the complainant's jurisdiction, *or in any other manner* has impeded or prejudiced the enforcement of the complainant's remedies, it should be held accountable in the first instance. Dissolution of the subsidiary should have the same result"). Just as CMOBC had regulatory obligations to supervise and administer Chase Jamaica (p. 9, *supra*), as sole stockholder, it had the fiduciary duties which the liquidation of Chase Jamaica breached. Ballantine, *Corporations* §141 (Rev. ed. 1946) (black letter that "a holding company has a fiduciary obligation toward minority . . . [stockholders of subsidiary] and also to its creditors"). For all these reasons CMOBC's assertion of limited liability is grossly inequitable to Rose Hall, and the entities should be disregarded to hold it liable.

III. THE OPINION BELOW APPLIED THE COURTROOM IMMUNITY WITH UNPRECEDENTED BREADTH, RESTRICTING OR DESTROYING LONG-RECOGNIZED REMEDIAL POWERS OF FEDERAL COURTS.

A. *The importance of this question warrants this Court's review:* This Court addressed the familiar immunity of lawyers, witnesses and parties from civil damages liability for courtroom statements in *Briscoe v. Lahue*, 460 U.S. 325 (1983), and *Imbler v. Pachtman*, 424 U.S. 409, 426 n.23, 438-40 (1976). This immunity bars suits attempting to state new or independent causes of action for courtroom statements, but the Opinion below, without precedent, extended the immunity to cut off Rose Hall's remedy on its underlying cause of action for wrongful sale of its property. This extension makes the immunity curtail important powers of federal courts, long recognized by this Court, to shape or extend their remedies in response to deception of the court (pp. 19-20, *infra*). Indeed, if the immunity limits the remedy on such an underlying claim, it follows that once a courtroom deception has occurred no judicial remedy on the claim in suit can respond to the deception or its effects.

The question happens to arise in the context of the deception of another court in a parallel action, but the novel immunity theory below equally hamstrings any corrective response by a court which is itself deceived.[10] Thus, from the standpoint of litigants calculating what they might get away with, the Opinion below teaches that the immunity can permanently protect the poten-

10. The Opinion below reasons that the immunity bars veil-piercing against CMOBC below, precisely because it would also bar that relief in the deceived court itself, had CMOBC been before it (A-31-32). The happenstance of separate forums cannot affect the immunity; it is defined by the nature of the claims it bars, not by choice of forum (*see* pp. 23-25, *infra*). Thus, if the immunity bars corrective veil-piercing here, it must equally bar it where both parent and subsidiary are before one court in one action.

tially large practical results of a temporarily successful deception in preliminary proceedings. In a time of nationwide concern about professional standards and litigation abuses, this weed should be swiftly uprooted.

B. *Federal courts have broad remedial powers to correct the effects of a deception of a court and to disregard corporate entities*: Where a court is imposed upon by deception at the preliminary injunction stage, the deceived court, or any other court which finally adjudicates that cause of action, has and must have broad remedial power to correct the imposition and restore, so far as possible, the position of the aggrieved party. For instance, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944), this Court explained:

> Equitable relief against fraudulent judgments is not of statutory creation. . . . Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by remedial flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.

Indeed, Fed. R. Civ. P. 60(b)(3) expressly empowers federal courts to "relieve a party or his legal representative from a final judgment, order or proceeding for . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic) . . . of an adverse party." No known authority has applied the immunity to defeat or limit these powers.

Both Rule 60(b)(3) and *Hazel-Atlas* address relief from final judgments. *A fortiori*, a court imposed upon at the preliminary injunction stage must have equal or greater remedial flexibility. The strong competing policies protecting the finality of judgments do not apply, because preliminary decisions have no finality. And where the deceived court cannot grant corrective relief, the court where the same cause of action is litigated to finality may surely do so. Here the deceived court is so

disabled, because Chase Jamaica is judgment-proof, CMOBC cannot be sued in Jamaica, and the Jamaican court could not retrospectively undo the sale, made to a bona fide purchaser whose title is protected by a Jamaican statute.[11] *See The Rule Against Civil Actions For Perjury In Administrative Agency Proceedings: A Hobgoblin of Little Minds*, 131 U. Pa. L. Rev. 1208 (1983).

The scope and flexibility of the power to disregard corporate entities is discussed at pp. 14-17, *supra*. The additional point here is that by its very nature, disregard of entities can only affect the scope of the remedy on an underlying cause of action; even the Opinion below recognizes that it "does not, in and of itself, confer any additional substantive rights upon a plaintiff" (A-32). For instance, if the separate entity of Chase Jamaica did not exist at all, CMOBC would directly and wholly own the business of Chase Jamaica, and would be liable on Rose Hall's underlying cause of action under ordinary principles. However, CMOBC owns that business indirectly through the subsidiary, and invokes the immunity called limited liability. *See, e.g.*, Powell, *Parent & Subsidiary Corporations* §1 (1931); 18 C.J.S. *Corporations* §581 (1939) (black letter that limited liability makes parent "immune" unless "this immunity" is disregarded). Dis-

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11. Ordinarily, one aggrieved by the deception of a court must seek relief in the deceived court in the same case, because *res judicata* gives finality to that court's judgment. Here the deceived court (a) made only a preliminary decision having no finality there or elsewhere, *Restatement (2d) Judgments* §§13, 27, and (b) retains no power to grant further relief from the deception, and (c) has already granted the only realistic relief it could, by expressly approving Rose Hall's pursuit of CMOBC under American law in the second forum (*See* p. 6, *supra*). Rose Hall had to seek the corrective veil-piercing remedy in a different forum; Chase Jamaica can be sued only in Jamaica, while CMOBC cannot, so no court has jurisdiction over both. Such happenstances affecting choice of forum do not affect the immunity, which is measured by whether the aggrieved party is trying to make the deception the gist of a new cause of action (*See* pp. 23-25, *infra*).

regarding the entity does not change the cause of action, but only removes this immunity.[12] In this regard, veil-piercing operates like a subsequent merger. If X has a cause of action against subsidiary corporation S, whose existence is later extinguished by merger into P, its parent, there is no new cause of action against P "for merging" — the merger extends a remedy against P on the original cause of action. For instance, one would expect the statute of limitations to run in P's favor from the date of S's wrong, not from the merger — just as one would expect it to run in favor of CMOBC from the date of Chase Jamaica's wrong.

C. *The courtroom immunity does not limit the powers of federal courts to correct courtroom deceptions and to disregard corporate entities*: As the Opinion nowhere denies, the immunity does not purport to limit anyone's becoming liable *because of* courtroom statements; it only protects against "damages liability *for*" such statements, *Briscoe v. Lahue*, *supra*, 460 U.S. at 325, so those protected may speak in judicial proceedings free of a narrow and special fear — the fear of suit on new causes of action against themselves, and perhaps others related to them, *for* courtroom statements. This is not such a suit. Suppose a defendant's courtroom statements estop his assertion of an otherwise valid defense of limitations as to some claim. The statements would thus be "pivotal" to liability on that claim in the "because of" sense mistakenly applied below (A-34-37), but the claim would not be a suit "for" the courtroom statements, and the immunity would not prevent the estoppel as if the statements were

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12. *See, e.g., Bucyrus-Erie Co. v. General Products Corp.*, 643 F.2d 413, 421-22 (6th Cir. 1981) (veil pierced against individual; he is thus "treated as having *assumed the position* of the corporation . . . to the full extent of its obligation"); *Pauley Petroleum, Inc. v. Continental Oil Co.*, 239 A.2d 629, 633 (Del. 1968) (entities "may be disregarded and the ultimate party in interest, the parent, be *regarded in law and fact as the sole party* in a particular transaction" — the underlying transaction).

"the gist of [or even "part of"] the cause of action." *A fortiori*, the Opinion was plainly wrong to apply the immunity in that way here; unlike limitations, limited liability is not a complete defense and does not even affect the cause of action, but goes to limiting plaintiff's source of collection. *See, e.g.*, Latty, *Subsidiaries & Affiliated Corporations* 9 (1931) (" 'Separate entity' is merely a way of saying that [plaintiff] is not to look to [stockholders'] general assets").

No known authority ever before applied the immunity to deny judicial power to disregard corporate entities in response to deception of a court. The Opinion below does so, invoking the policy of the immunity "to avoid a multiplicity of actions in which the value or truth of the evidence would be tried over again" (A-28, A-31-32) — a strange policy to invoke in favor of a preliminary ruling, which may be relitigated to finality as a matter of right. Here the real point of that policy favors Rose Hall. Typically, where a court tells a party, "go home, you've lost," the immunity bars that party from trying to evade the finality of the ruling by asserting some new cause of action for courtroom falsehoods. Here, in contrast, the deceived court ruled, "you get no injunction, *because you do have a remedy in damages* on this cause of action." Rose Hall's effort to disregard corporate entities against CMOBC does not seek to evade that, but to fulfill it, and to fulfill the underlying representations about parent company backing. No known authority has applied the immunity to interfere with any such fulfillment, and the people evading the deceived court's decision — thus far successfully — are the people running CMOBC and Chase Jamaica.

The only other immunity policy the Opinion below invokes is "one of the principal purposes of the rule . . . to prevent disgruntled litigants from bringing vexatious suits against witnesses" which, the Opinion reasons, must also immunize those related to witnesses, such as CMOBC (A-28, A-30). However, Rose Hall has sued no

witness and no lawyer, nor has it sued CMOBC "for" anyone's courtroom statements. Assuming the complete truth of Chase Jamaica's presentation to the deceived court, that court's decision already contemplated later litigation of Rose Hall's underlying damage claim to finality. Rose Hall simply seeks to preserve that remedy "for" wrongful sale of its property, by a conventional equitable intervention. This creates no *new* cause of action to be litigated "for" — or even "because of" — the deception, but only a legitimate continuation of the underlying cause of action. There is no new claim to which the immunity policies about multiplicity of actions and vexatious claims can fairly apply.[13]

The Opinion below nevertheless says the issue here is "whether CMOBC can be held liable *for* the alleged fraud" on the court (A-26). This mistaken premise is at the heart of the Opinion; its entire discussion (from A-23 to A-40) is captioned "The existence of a cause of action *for* false testimony in the Jamaican court" (A-23), and it says "one theoretically cannot reach" the issue of piercing the corporate veil against CMOBC, unless there is "a cause of action against [the witness Brown], Chase Jamaica or CMOBC in tort for civil damages arising from the perjured testimony" (A-26). The Opinion below therefore relies wholly upon English and American cases about attempts to assert a tort of courtroom falsehood. It quotes *Marrinan v. Vibart* [1962] 1 All E.R 869, 871, involving a charge of conspiracy in a courtroom falsehood, where the court expressly said that if "the contention were correct that *the gist of the tort* of conspiracy is the conspiratorial agreement alone, *it may be that the plaintiff would*

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13. The immunity prevents the endless chains of suits which could occur, if a party could freely make a purported new cause of action arise like a phoenix from the ashes of defeat on the underlying claim. Since Rose Hall still asserts its underlying claim, and veil-piercing cannot generate litigation beyond the life of that claim (see pp. 20-21, *supra*), Rose Hall's analysis is inherently a one-trip ticket, without risk of such an endless chain.

be entitled to succeed," but held that the immunity barred the claim because the false testimony was there "*an integral part of the tort*" and thus "part of [plaintiff's] cause of action" (A-30-31). Later a higher court, the House of Lords, held that the immunity permits false evidence to be *part of* a cause of action, provided it is not *the gist of* the cause of action, *Roy v. Prior* [1970] 2 All E.R. 729, 733-34 (H.L.):

> The fact that in order to procure the arrest someone (who might or might not be the defendant himself) would have to give evidence on oath . . . does not have the result that an action, if otherwise sustainable, could not be brought. *The gist of the complaint*, where malicious arrest is asserted, is not that some evidence is given. . . .
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> * * *
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> [The immunity] does not involve that an action which is not brought in respect of evidence given in court but abuse of process of court must be defeated *if one step in the course* of the abuse of the process of the court *involved or necessitated the giving of [false] evidence*. . . .

American immunity law follows the English precedents (p. 13, n.4, *supra*) and is the same.[14]

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14. For instance, applications to courts may apparently be part of a larger wrong constituting an antitrust violation. *See California Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513-14, 517-18 (1972); *Annotation*: 62 ALR Fed. 203, 212-14 (1983). *See also Morgan v. Graham*, 228 F.2d 625, 627-28 (10th Cir. 1956); *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 497 F. Supp. 637, 639 (S.D.N.Y. 1980), *aff'd*, 697 F.2d 287 (2d Cir. 1982); *Frist v. Gallant*, 240 F. Supp. 827, 828-29 (W.D.S.C. 1965); *Robinson v. Missouri Pacific Transport Co.*, 85 F. Supp. 235, 238 (W.D. Ark. 1949). The Opinion reads these cases as allowing only actions for larger fraudulent "schemes" of which perjury was a part (A-37-38), but actions involving a larger wrong amounting to constructive fraud are not different in any way material to the policies of the immunity, and the

Since the immunity of Chase Jamaica's lawyers and witnesses only precludes new and independent causes of action for what they said, and the corrective disregard of entities Rose Hall seeks here involves no new tort at all, and no new or independent cause of action at all, the immunity is simply irrelevant. Thus, the courts below should have taken cognizance of the assurances to the Jamaican court about Chase Jamaica's ongoing solvency, and the deceptive nature of those assurances, for purposes of disregarding the entities.

D. *The assurances to the Jamaican court about Chase Jamaica's ongoing financial responsibility, taken together with the later emptying of Chase Jamaica, make CMOBC's assertion of limited liability still more gravely inequitable*: The district court closed its eyes to the assurances to the Jamaican court, and saw "nothing remotely approaching fraud in a wholly owned subsidiary paying off creditors upon closing its business even thought there is outstanding a contingent claim to be resolved" by litigation (A-40). Despite Rose Hall's argument that the assurances and the stripping should be considered together (A-32-33) *there is not a word in the Opinion about why Chase Jamaica or those who control it could equitably or legitimately do this, after a court had relied on the assurances that Chase Jamaica would remain financially able to pay Rose Hall's claim.*

Rose Hall here uses the 1976 assurances to the Jamaican court as creating circumstances in which the later emptying of Chase Jamaica, and CMOBC's assertion of limited liability are, *taken together*, so inequitable that CMOBC may not assert limited liability. The district court ruled, *sua sponte* and mistakenly, that Rose Hall had waived this argument,[15] and it is not clear whether it also

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Opinion mistakenly disregards the stripping of Chase Jamaica as part of a larger wrong here (A-39-40; *see* pp. 25-30; *infra*).

15. All the court cited were two cases which say a plaintiff, attacking a jury's adverse findings, waived arguments by not making them at the jury instruction stage (A-32-37). This does not apply;

thought its immunity ruling barred this use of the assurances to the Jamaican court.

Not only is the immunity inapplicable here for all the reasons discussed above, but it surely could not bar this approach which uses the assurances to the Jamaican court simply as assurances — treating them as if true, or as if innocently mistaken when made. The jury found they were in fact false and part of a deception, but this cannot make CMOBC's legal position *better* than it would be, had the assurances been true and/or innocently made.

The district court found another ground for refusing to accord any significance to the assurances to the Jamaican court; it focused narrowly on whether CMOBC itself controlled the assurances. Although it articulated no reason why, it treated CMOBC's control of them as an absolute precondition of disregard of the entities (A-51). The jury found that Rose Hall met this supposed requirement; its verdict was that CMOBC controlled the deception of the court, which centered on the assurances. The district court, holding the evidence did not support this, used that as an alternative ground for granting CMOBC judgment n.o.v. (A-51-52). This was based on a narrow item-by-item discussion of evidence, disregarding its cumulative force,[16] and involving an obvious

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Rose Hall's argument did not attack the verdict below but relied on it as given — it was CMOBC which sought judgment notwithstanding the verdict. Rose Hall simply responded to CMOBC's immunity argument by shifting emphasis from the falsity of the assurances given to the Jamaican court, to stress that even if innocently made, those assurances made the subsequent emptying of Chase Jamaica inequitable — all of which was within Paragraph 54 of the Complaint (488-89a) and the Pre-trial Order (475a(4)(5)). To confine a successful plaintiff precisely to a theory held faulty only after trial, refusing the recovery a Rule 49(a) verdict supports under a modest refinement of the theory, is to misunderstand the justice-seeking process of entering judgment on a Rule 49(a) verdict. To do so is, also, to exalt procedure over substance, and to do injustice.

16. Rose Hall has a substantial record to support this verdict, discussed in 23 pages of Rose Hall's briefs to the court of appeals,

misunderstanding of the record.[17]

The district court recognized in another connection that "the record contains substantial evidence of general control of Chase Jamaica by various Chase entities. . . . At first blush this evidence would appear damning" (A-117); the court said "sufficient evidence exists to support a finding of indirect general control" (A-119). Having recognized this, the court had no basis to deny the jury its right to infer that CMOBC controlled the assurances. In fact, CMOBC has *never* submitted evidence, or even argued, that the assurances made to the Jamaican court about parent company backing were unauthorized. To the contrary, when parent company backing was needed in the Jamaican stay proceedings, CMOBC purported to provide it, albeit on a conditioned basis adjudicated to be

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reproduced in the Appendix here (A-166- 90). For example, there was admittedly a "chain of command" whereby Brown, Chase Jamaica's managing director who testified in the Jamaican injunction proceeding, had a "boss," Giberga, who in turn had a "boss," Mason, etc., and, as CMOBC's president conceded, "the practical leadership flows down this chain of command" and "none of this is a matter of by-laws or board of dirctors in terms of who's the boss"(1459a). Rose Hall has had no real appellate review on the point. At argument in the court of appeals nothing was said about CMOBC's involvement in the deception; the panel focused on the immunity, and its questions and comments plainly indicated a view of the immunity adverse to Rose Hall — which, the Opinion says, is dispositive (A-40). That made it unnecessary for a busy court of appeals to decide whether the record supports this part of the verdict. If this Court accepts Argument I, Argument II, or Argument III as presented, this need not be resolved. However, if this becomes dispositive, we do ask the Court to decide it or, in the Court's discretion, to remand it to the court of appeals for decision.

17. For example, the court said, referring to whether CMOBC was involved in the proceedings before the Jamaican Court, "consultation up the [corporate] ladder is pure speculation on plaintiff's part" (A-47). This entirely overlooks a memorandum in evidence showing communications about the defense of the injunction proceeding with personnel, located in the New York office where CMOBC then was, who held positions with CMOBC as well as other Chase entities (3934a).

"worthless" (p. 6, *supra*). Moreover, CMOBC's president testified at trial below that CMOBC "would assist Chase of Jamaica in satisfying a [Rose Hall] judgment" (1407a) and Brown, Chase Jamaica's managing director, who gave the testimony in Jamaica, also testified below that to satisfy a damage judgment "Chase Jamaica would always have the resources to call to Chase Manhattan Bank to assist . . . or to CMOBC . . ." (2168a). Under the circumstances, the jury had every right to infer that the assurances to the Jamaican court about parent company backing were duly authorized by CMOBC.

Moreover, the court had every reason, based on CMOBC's assertions, to hold it liable as a matter of law. As stated in Powell, *Parent & Subsidiary Corporations* 66 (1931), "If the parent corporation, expressly or impliedly, holds itself out as responsible for its subsidiary . . . or if it clothes the subsidiary with apparent, but not real, assets upon which the latter's creditors are entitled to rely, *it* will *be liable*." This veil-piercing principle can apply to assertions made in a judicial setting. Compare judicial estoppel, discussed in *United Virginia Bank v. B.F. Saul Real Estate Inv. Trust*, 641 F.2d 185, 189-90 (4th Cir. 1981).

Finally, this whole issue should not have been treated as determinative. It does not matter whether CMOBC, specifically, controlled the assurances to the Jamaica court, because its own 100% parent, Chase, unquestionably did so. All the people involved in CMOBC and Chase Jamaica were Chase officers, including the two unquestionably involved in the assurances — the witness Brown and his "boss" Giberga. Both were Chase officers with responsibility as to Chase Jamaica,[18] and the deception they accomplished, combined with the later stripping of Chase Jamaica, directly benefited Chase, which thereby

18. Based on the apparent involvement of Giberga in the deception, the Opinion says the jury could properly conclude that another subsidiary in which he held an office, was involved in the deception in the sense the Opinion requires (A-49).

received repayment of millions from Chase Jamaica (See pp. 4-5, *supra*). In such a setting, creditor claims of Chase against Chase Jamaica could not equitably stand ahead of or equal to Rose Hall in the *Pepper v. Litton* "order of payment" (p. 14, *supra*), after a court had relied on express assurances that Chase Jamaica's assets (and its parent's backing) would afford Rose Hall a meaningful damages remedy.[19]

Thus, the Opinion did not have to struggle to find individuals involved in the deception, with titles in CMOBC, because CMOBC's possible lack of control over a deception involving Chase is unimportant. The relevant equities are those of the real owner, Chase, not CMOBC, and any wholly owned Chase entity, including CMOBC, can be the source of collection. *See FMC Finance Corp. v. Murphree*, *supra*. This is so because the problem is collection -- a damaged plaintiff faces an empty entity. The question is whether the nature and gravity of this injustice warrants disregard of artificial entities so plaintiff can collect from the real owners. The nature and gravity of this injustice does not vary by a particle depending on the titles of those involved, or in which specific Chase entities they held titles; the organization of *people* in the Chase chain of command (*see* n. 16, *supra*) created this injustice *through* their management of *multiple* entities.[20] In such a case, when a fed-

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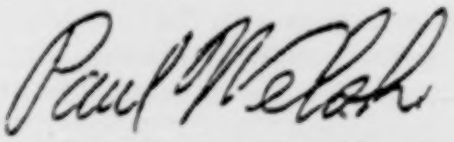
19. This would be so even if no other Chase entities at all were "linked" to Chase Jamaica's assurances. Its affiliates could not *qua* creditor prevent Chase Jamaica from encumbering or disposing of its assets. Chase Jamaica's unilateral assurances, therefore, could create equities in Rose Hall, superior to those of Chase Jamaica's affiliates, and the later stripping of Chase Jamaica grossly violated those equities.

20. There are no competing equities of others having interests in CMOBC. CMOBC is abundantly solvent, and it has no shareholders but Chase. The real ownership of all relevant Chase entities is identical — Chase wholly owns CMOBC, while CMOBC wholly owns Chase Jamaica. It makes no economic difference whether Rose Hall recovers from CMOBC or from either of the others.

eral court looks to the realities to remove an unjust obstacle to collection, it must have power, in appropriate circumstances, to collect through any entity under identical real ownership — involved or not. Otherwise, elaborate structures of entities which separate the assets from the activities could never be pierced, making it simple to place the most extreme abuses beyond all remedy.

Indeed, it was inconsistent with the very concept of disregarding entities for the district court to insist that CMOBC, as an entity, had to take part in the deception of the court — a thought perhaps influenced by the same inapplicable tort concepts which governed its view of the immunity (pp. 22-23, *supra*). After Chase officers committed the deception and Chase received its benefits, neither Chase nor CMOBC — admittedly the wholly owned "vehicle by which Chase Manhattan Bank, N.A. set up a banking business *and ran* a banking business in Jamaica" (1439a) — can equitably assert limited liability, just as this Court held the subsidiary in *Bangor Punta*, *supra*, could not equitably assert its claim in the teeth of its owner's lack of equity.

Respectfully submitted,



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November 9, 1984

84-760

No.

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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1984

ROSE HALL LIMITED,

Petitioner

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

APPENDIX TO PETITION OF ROSE HALL LIMITED FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-1845, 83-1865 and 83-1866

ROSE HALL, LTD.

v.

CHASE MANHATTAN OVERSEAS
BANKING CORPORATION,
and HOLIDAY INNS, INC.

Rose Hall Limited,
Appellant in No. 83-1845,

Chase Manhattan Overseas Banking Corporation,
Appellant in No. 83-1865,

Holiday Inns, Inc.,
Appellant in No. 83-1866

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
(D.C. Civil No. 79-182)

Argued July 10, 1984
Before: HIGGINBOTHAM and SLOVITER,
Circuit Judges
and GREEN, *District Judge**

---

*Honorable Clifford Scott Green, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by the appellants, for the reasons noted by Judge Schwartz in his thoughtful opinion, *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 576 F.Supp. 107 (D.Del. 1983), it is

ADJUDGED, ORDERED and DECREED that the judgment of the district court be and is hereby affirmed.

Each party to bear its own costs.

BY THE COURT,

A. Leon Higginbotham, Jr.

Circuit Judge

DATED: July 13, 1984

ROSE HALL, LTD., PLAINTIFF,

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION
and Holiday Inns, Inc., Defendants.

Civ. A. No. 79-182.

United States District Court, D. Delaware
Aug. 19, 1983
As Amended Sept. 6, 1983.

OPINION

MURRAY M. SCHWARTZ, District Judge.

Introduction

After 81 jury trial days spanning over five months and generating over 15,500 pages of trial transcript followed by seven and one-half days of deliberations, the jury returned its special verdict, consisting of answers to six interrogatories. (Docket Item "Dkt." 756). Before judgment was entered on the special verdict, the presiding trial judge, the Honorable Edwin D. Steel, Jr., became seriously ill and unable to discharge his judicial duties. On May 5, 1983, pursuant to Fed.R.Civ.P. 63, the case was assigned to Judge Murray M. Schwartz. Thereafter, the Court heard argument on the parties' proposed forms of judgment. Because of scheduling constraints, the Court instructed the parties to begin briefing their post-judgment motions prior to the entry of judgment on the assumption that judgment would be entered adverse to each in all respects. Plaintiff, Rose Hall Ltd. ("Rose Hall" or "plaintiff"), and defendants, Chase Manhattan Overseas Banking Corporation ("CMOBC") and Holiday Inns, Inc. ("Holiday Inns"), filed their opening briefs on post-trial motions on June 6, 1983.[1] On June 10, 1983,

1. Dkt. 770, 771, 772.

the Court entered judgment on the verdict for plaintiff against CMOBC in the amount of six million dollars plus prejudgment interest, and for Holiday Inns against plaintiff. *Rose Hall v. Chase Manhattan Overseas Banking Corp.*, 566 F.Supp. 1558 (D.Del 1983) [hereinafter cited as "Judgment Opinion" or "Dkt. 773"]. Briefing on the post-judgment motions as originally instructed by the Court was completed on July 11, 1983, and hearing was held on July 15, 1983.

As a result of the briefing of post-judgment motions prior to entry of judgment, the Court is in the unusual position of having before it motions from both plaintiff and CMOBC for judgment notwithstanding the verdict or, in the alternative, a new trial.[2] On July 5, 1983, Rose Hall amended its motion for judgment notwithstanding the verdict or alternatively for a new trial to seek such relief only if the Court grants CMOBC any of the relief sought in its motion for judgment notwithstanding the verdict or new trial. (Dkt. 869).

The Court first considers CMOBC's post-judgment motions. The Court has determined that CMOBC's request for judgment notwithstanding the verdict on the only issue upon which judgment was granted to plaintiff, deceit on the court, must be granted. Applying Fed.R.Civ.P 50(c)(1), the Court is instructed to rule on defendant's new trial motion; that ruling forms the next portion of the opinion. Plaintiff's motion for judgment notwithstanding the verdict or in the alternative, a new trial is addressed in the next portion of this opinion as if it had been filed pursuant to Fed.R.Civ.P. 50(c)(2). The Court concludes that plaintiff's motion for judgment notwithstanding the verdict or, alternatively, new trial should not be granted. Finally, the opinion addresses the issue of costs deferred by the Judgment Opinion.

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2. The plaintiff has also made a conditional motion that if the Court grants a new trial of any other issue, it should grant a new trial on the issue of Holiday Inns' liability. Holiday Inns opposes this motion. *See* Dkt. 771, 772, 866.

The Court has attempted to treat the significant issues presented by the parties. Due to the enormity of the post-judgment briefing, totaling over 550 pages not including the incorporation by reference of several earlier briefs and letters encompassing hundreds of pages, the Court's treatment of these issues has resulted in an opinion of inordinate length. Any issue not specifically addressed may be assumed to have been resolved against the moving party.

The background facts have been set forth at length in the Judgment Opinion. In order to clarify the complex history of this case, a largely verbatim recitation of the facts from the Judgment Opinion will be set forth. In addition, relevant facts are stated in more detail as required in the various sections of the opinion.

I. *Background Facts*

Plaintiff, Rose Hall, is a Cayman Islands corporation whose ultimate principal and controlling stockholder is John W. Rollins, Sr. Rose Hall owned approximately 5500 acres of land on the north coast of Jamaica near Montego Bay. In the late 1960's, Rose Hall organized a wholly owned subsidiary company named Rose Hall (H.I.) Ltd. ("Rose Hall (H.I.)") for the purpose of owning a hotel in Jamaica to be known as the Rose Hall Holiday Inn. The hotel property owned by Rose Hall (H.I.) consisted of the hotel building and an 11 acre tract of land cut out from the Rose Hall acreage. The hotel was financed by a $6,250,000[3] loan from the Bank of Nova Scotia ("BNS") to Rose Hall (H.I.) and leased to a subsidiary of Holiday Inns for a twenty year term but guaranteed by defendant Holiday Inns.

3. Since both Jamaican and United States currencies are relevant to the transaction and underlying facts, Jamaican currency will be referred to as "$J." All other currency figures may be assumed to be in United States currency.

Chase Merchant Bankers Jamaica, Ltd. ("Chase Jamaica") is a wholly owned subsidiary of the only "Chase" defendant in this action, Chase Manhattan Overseas Banking Corporation, which in turn is a wholly owned subsidiary of Chase Manhattan Bank, N.A. ("CMB"), a wholly owned subsidiary of the Chase Manhattan Corporation. Chase Manhattan Overseas Corporation ("CMOC") is another wholly owned subsidiary of the Chase Manhattan Bank, N.A.

On June 3, 1974, Rose Hall borrowed $3,000,000 from Chase Jamaica. As security for the loan, Rose Hall gave Chase Jamaica a first mortgage on approximately 3000 acres of Rose Hall's land, lying largely in the middle of the 5500 acre assemblage and a pledge of all the shares of Rose Hall (H.I.) and caused Rose Hall (H.I.) to give a second mortgage on the Rose Hall Holiday Inn.

Rose Hall quickly went into default on its loan from Chase Jamaica. By mid-1975, Rose Hall (H.I.) had entered into negotiations for the sale of the hotel to the Urban Development Corporation ("U.D.C."), a corporation owned by the Jamaican government. By May or June 1976, those negotiations had crystallized into a tentative arrangement with the Jamaican government. The hotel and the 11 acres on which it was situated would be sold to the U.D.C. for $13,000,000, payable in $10,000,000 cash and $3,000,000 in long-term Jamaican government guaranteed debentures.

As the sale negotiations continued, Rose Hall fell further behind in payments due under the Chase Jamaica loan. In early1976, Chase Jamaica, as pledgee of the shares, registered the stock of Rose Hall (H.I.) in its name and became involved in the sale negotiations.

Holiday Inns learned of the sale negotiations in approximately April 1976, and, desiring to modify the terms of the lease with Rose Hall (H.I.) which it considered oppressive, held discussions with John Rollins and Jamaican government representatives. Plaintiff con-

tended that these discussions embodied: first, threats to breach its lease unless it was granted concessions; second, false and malicious statements that Rose Hall (H.I.) had misrepresented its earnings to the government; and third, assertion of a false claim that Rose Hall (H.I.) owed Holiday Inns approximately $4 million previously spent by the lessee for maintenance and repair of the hotel. Without specifying which allegation formed the basis for its finding, the jury implicitly concluded that Holiday Inns wrongfully interfered with the Rollins negotiated proposed $13,000,000 sale to U.D.C. and thereby caused Rose Hall $4,500,000 in damages.[4]

In early August, 1976, Chase Jamaica informed Holiday Inns that the Rose Hall (H.I.) shares were in its name and arranged a meeting for August 20, 1976 in Miami, Florida. This meeting formed the basis of conspiracy claims by plaintiff against the defendant Holiday Inns. Rose Hall alleged that Chase Jamaica and Holiday Inns conspired to frustrate the consummation of the $13,000,000 arrangement and replace it with a sale at a drastically reduced price, thereby accomplishing objectives beneficial to themselves without regard to Rose Hall's interests. The jury, however, found that there was no such conspiracy.[5]

In late August, 1976, the U.D.C. formally notified Rose Hall (H.I.) that it was no longer interested in pursuing the $13,000,000 negotiations. On September 14, 1976, Chase Jamaica made a proposal far more attractive to the U.D.C. Instead of $13 million for the hotel only, Chase Jamaica offered to sell to the U.D.C. all of the Rose Hall collateral for approximately $9.5 million, consisting of $8.5 million for the shares of stock of Rose Hall (H.I.) and $1 million for the 3000 acres of mortgaged land. The U.D.C. accepted the offer in late September or early October, 1976, with closing taking place

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4. *See* Interrogatory Nos. 2 and 6, *infra*, p. 121.
5. *See* Interrogatory No. 5, *infra* p. 121.

on November 18, 1977. In this action, plaintiff alleged and the jury found that this sale was unreasonably "cheap"[6] and in violation of Chase Jamaica's mortgagee duties, determining that, as a result, plaintiff was damaged in the amount of $1,500,000 for the cheap sale of the land and $0 for the shares of Rose Hall (H.I.).[7]

On September 21, 1976, Rose Hall representatives requested Chase Jamaica to permit Rose Hall (H.I.) to bring a lawsuit in Georgia against Holiday Inns for interference with the $13,000,000 arrangement. Rose Hall representatives also requested that Chase Jamaica withdraw its offer of sale to the U.D.C. In December, 1976, a lawyer for the Jamaican government requested that Chase Jamaica sell the assets of Rose Hall (H.I.) instead of its shares. Chase Jamaica refused these proposed courses of action and subsequently consummated its $9.5 million sale to the U.D.C. of Rose Hall (H.I.) stock and 3000 acres of land. By selling stock rather than the hotel asset, Chase Jamaica effectively made the interference claim against Holiday Inns unavailable to plaintiff. Rose Hall sued Holiday Inns in Georgia for wrongful interference with the $13,000,000 sale negotiations on September 30, 1976. The Georgia court held, without determining the merits of the interference claim, that such a suit could only be brought by Rose Hall (H.I.). *Rose Hall, Ltd. v. Holiday Inns, Inc.*, C.A. No. C227-30 (Ga.Super.Ct., Fulton Cty., filed Sept. 30, 1976), *aff'd*, 146 Ga.App. 709, 247 S.E.2d 173, *cert. denied*, No. 55491 (Ga. Oct. 3, 1978). In effect, the Georgia court confirmed the unavailability of the interference claim. The jury found that Chase Jamaica wrongfully prevented Rose Hall from suing Holiday Inns in the Georgia action, and as a result plaintiff suffered

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6. Throughout the course of this litigation, the colloquialism "cheap" has been used to describe the sale of the land at less than the best available price.

7. *See* Interrogatory Nos. 1 and 6, *infra* p. 121.

$4,500,000 in damages.[8]

On October 4, 1976, Rose Hall filed an action in the Supreme Court of Judicature of Jamaica to enjoin the sale of stock and land by Chase Jamaica to the U.D.C. and, alternatively, for damages. The Jamaican court refused to enjoin the sale on the ground that monetary damages would be an adequate remedy if Rose Hall succeeded in proving its case at trial. *Rose Hall, Ltd., et al. v. Chase Merchant Bankers Jamaica Ltd., et al.*, Suit No. E-211 of 1976 (Sup.Ct. of Judicature of Jam., Jan. 17, 1977). (Plaintiff's Exhibit "PX" 140). In the instant action, the plaintiff contended, and the jury found, that the defeat of the injunction was caused by misrepresentations to the Jamaican court made by representatives of Chase Jamaica to the effect that it would be financially able to meet any damage liability in view of the permanence of its Jamaican operation and its affiliation with the other Chase entities. There was evidence that at the time these representations were being made, actual undisclosed plans to close down Chase Jamaica's operation existed.[9] By February 1978, Chase Jamaica's office closed and ceased active business.

In mid-1980, the Jamaican court listed the Jamaican action for trial in January, 1981. Rose Hall moved to stay the Jamaican action pending resolution of the Delaware action. CMOBC opposed the stay and offered to pay any final judgment that might be entered against Chase Jamaica to the extent of J$10,000,000, subject to certain conditions. The Jamaican court, noting that CMOBC's offer was so conditional as to be "worthless," granted the stay of the proceedings. *Rose Hall Ltd., et al. v. Chase Merchant Bankers Jamaica Ltd., et al.*, Suit No. E-211 of 1976 (Sup.Ct. of Judicature of Jam., Feb. 12, 1981) (PX 141, p. 21). On Chase Jamaica's appeal, the Court of Appeal of Jamaica affirmed the granting of the stay.

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8. *See* Interrogatory Nos. 2 and 6, *infra* p. 121.
9. *See* Interrogatory No. 4, *infra* p. 121.

Chase Merchant Bankers Jamaica Ltd., et al. v. Rose Hall Ltd., et al., Sup.Ct. Civil Appeal No. 78/80, (Ct. of Appeal, Jam., June 23, 1982) (PX 641). Chase Jamaica then appealed the decision to the Privy Council in London. This appeal has apparently been abandoned. (Dkt. 868, p. 77 n. *).

On April 11, 1979, Rose Hall filed the instant action against CMOBC, the parent corporation of Chase Jamaica, and against Holiday Inns. One of the alternative grounds advanced by plaintiff for imposing liability on the parent, CMOBC, for Chase Jamaica's wrongs is embodied in Paragraph 54 which was added to the Second Amended Complaint by amendment on September 30, 1982.[10] After extensive discovery, a jury trial was

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10. Paragraph 54 reads as follows:

54. In addition to its liability under the Federal Reserve Act, referred to in paragraphs 2, 3 and 5 hereof, Chase Overseas [CMOBC] is liable for, and should be regarded in law and in fact as a party to, all the wrongful acts and omissions of Chase Jamaica or "Chase" alleged in this complaint, because Chase Overseas' power of control over Chase Jamaica and Chase Jamaica's status as a purportedly separate entity, have been used, to plaintiff's injury, to justify wrong and to perpetrate and protect fraud, and to attempt further frauds. The fraud commenced in the early proceedings in the Supreme Court of Judicature of Jamiaca in *Rose Hall Limited, et al. v. Chase Merchant Bankers Jamaica Limited, et al.*, Suit No. E-211 of 1976 ("The Jamaican action"). Rose Hall's attempt to enjoin the reasonably [sic] cheap sale of the Rose Hall (H.I.) shares and 3,000 ± acres of land was defeated by false representations to the Jamaican Court that Chase Jamaica had substantial assets, would continue to do business in Jamaica, and was and would be in a position to pay whatever damages might be awarded to Rose Hall. The Jamaican Court believed these misrepresentations and denied the injunction for those express reasons. When these representations were made, Chase had already decided, as alleged in paragraph 16, above, to close down its Jamaican operation and liquidate as quickly as possible all of its loans in Jamaica, and the plans had already been made whereby "we should be out of Jamaica next year around the end of June"—*i.e.*, by June, 1977, well before the Jamaican action would be

held from October 12, 1982 to March 8, 1983. The jury returned the "Special Verdict Accompanied By Interrogatories to the Jury Under Rule 49(a)" on March 17, 1983. It reads as follows:

SPECIAL VERDICT ACCOMPANIED BY INTERROGATORIES TO THE JURY UNDER RULE 49(a)

1. In selling (a) the 3,000 ± acres of land and (b) the shares of Rose Hall (H.I.) Ltd. did Chase Jamaica breach its duty to act in good faith, without reckless disregard for the interests of the mortgagor, taking reasonable precautions to obtain the best available price and to avoid an unreasonable sale of excess collateral? Yes x No__

2. Did Chase Jamaica wrongfully prevent plaintiff from suing Holiday Inns in Georgia for alleged interference with the US$13 million sale either by Chase Jamaica selling to UDC shares instead of assets of Rose Hall (H.I.) or by refusing to take other action which would have permitted Rose Hall

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expected to reach trial. Chase thereafter carried these plans out as promptly as it deemed prudent, completing them in approximately February, 1978. More recently, Chase Overseas manipulated Chase Jamaica's defense of the Jamaican action, which remained pending as a damage action against the emptied shell of Chase Jamaica, seeking unfair litigation advantage to itself in this case. By such manipulation, Chase Overseas attempted to bring the Jamaican action to trial before this case, hoping to render this action moot and to avoid a trial here "involving the extensive pretrial discovery and trial practices attendant on the Delaware action" (which were later to reveal important additional documents damaging to Chase). For these purposes, Chase Overseas openly took part in the Jamaican action (in part purportedly through Chase Jamaica) and even attempted to bargain directly with the Jamaican court by offering, in the light of Chase Jamaica's having been stripped of assets, Chase Overseas' undertaking to "pay any final judgment that may be entered against Chase [Jamaica] in [the Jamaican action] up to the extent of [devalued] Jamaican dlrs ten million" if the Jamaican court would rule in favor of Chase Jamaica on the disputed issue whether an early trial of the Jamaican action should be had.

(H.I.) to join in the Georgia lawsuit? Yes x No __

3. Did CMOBC control Chase Jamaica's major decisions and actions relating to its actions under Question 1. or its actions under Question 2.?

As to Question 1.

(a) ? because of the Edge Act theory and/or Yes __ No x

(b) independently of the Edge Act Yes __ No x

As to Question 2.

(a) because of the Edge Act theory and/or Yes __ No x

(b) independently of the Edge Act Yes __ No x

4. Did Chase Jamaica, through its representations, as a result of its control by CMOBC, deceive the Jamaican court into not enjoining the sale of the collateral? Yes x No __

5. Did Holiday Inns wrongfully conspire with Chase Jamaica in (a) selling the land, or (b) the shares under Question 1. or in taking its actions under Question 2.?

A. As to the sale of the land—Question 1.(a) Yes __ No x

B. As to the sale of the shares of Rose Hall (H.I.)—Question 1.(b) Yes __ No x

C. As to Question 2. Yes __ No x

6. If the answer to Question 1. is "Yes", what damages, if any, did plaintiff suffer as a result:

(a) for the land $1,500,000

(b) for the shares $ 0

If the answer to Question 2. is "Yes", what damages, if any, did plaintiff suffer as a result: $4,500,000

NOTE: Answer Questions 3., 4., 5., and 6. only if Question 1. or Question 2. is answered "Yes." Regardless of your answer to Question 3., 4., or 5., answer Question 6.

The Special Interrogatories were formulated so that Interrogatory Nos. 1 and 2 posed the question of whether Chase Jamaica, a nonparty to this action, committed any wrong with respect to the sale of the land and Rose Hall (H.I.) shares or wrongfully prevented plaintiff from su-

ing Holiday Inns in Georgia. Interrogatory Nos. 3, 4 and 5 sought to determine who was liable if Interrogatory Nos. 1 and/or 2 were answered in the affirmative. Interrogatory Nos. 3 and 4 inquired whether CMOBC was liable. Interrogatory No. 3 centered on liability by reason of control of Chase Jamaica under plaintiff's Edge Act theory[11] or independently of the Edge Act while Interrogatory No. 4 sought to have the jury determine on an alternative theory of liability whether Chase Jamaica deceived the Jamaican court into not issuing an injunction and whether that deception resulted by reason of control by CMOBC. Interrogatory No. 5 sought to determine whether Holiday Inns was liable to plaintiff for wrongfully conspiring with Chase Jamaica. Finally, Interrogatory No. 6 sought to have the jury's assessment of damages if Chase Jamaica did commit any of the wrongs set forth in Interrogatory Nos. 1 and 2. An assessment of damages in answer to Interrogatory No. 6 does not necessarily mean Rose Hall is entitled to judgment. The jury was instructed to assess plaintiff's damages in Interrogatory No. 6 even if it found none of the named defendants in the lawsuit responsible for the wrongs committed by Chase Jamaica. This instruction by Judge Steel to the jury on the special verdict sheet was done over objection of CMOBC at the behest of plaintiff. Plaintiff consistently maintained before Judge Steel that CMOBC is liable for Chase Jamaica's breaches of duty under the Edge Act as a matter of law. As a consequence, plaintiff asserted prior to verdict, and continues to assert that the jury's answers to Interrogatory Nos. 3, 4 and 5 are irrelevant, *i.e.*, who is liable and on what theory is unimportant because CMOBC is liable as a matter of

11. The Edge Act, 12 U.S.C. §§611-632 ("Edge Act"), allows banks to carry on foreign or international banking through the agency, ownership, or control of branches or local institutions. For a discussion of plaintiff's Edge Act theory see *infra* pp. 161-166 and *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F.Supp. 1139, 1154-56 (D.Del.1980).

law. While ruling against plaintiff on its theory under the Edge Act, Judge Steel was obviously persuaded by plaintiff that if he were in error, a lengthy retrial could be avoided by obtaining the jury's assessment of plaintiff's damages without regard to who was liable.[12]

In answer to Interrogatory No. 1, the jury determined that Chase Jamaica, a nonparty in this action, wrongfully failed to realize the best available price for the land and shares of Rose Hall (H.I.) Ltd. in its sale to the U.D.C. In answer to Interrogatory No. 6, the jury found plaintiff was damaged in the amount of $1,500,000 for the land and $0 for the shares. Therefore, the jury necessarily concluded that at the time of the sale, the Rose Hall (H.I.) shares were worth no more to the U.D.C. than the $8,500,000 sale price it paid and the 3000 acres were worth $2,500,000, or $1,500,000 more than the $1,000,000 sale price paid by the U.D.C.

By its affirmative answer to Interrogatory No. 2, the jury determined that Chase Jamaica wrongfully prevented Rose Hall from suing Holiday Inns for interference in the $13,000,000 sale negotiations between John Rollins and the U.D.C. In answer to Interrogatory No. 6, the jury found that as a result plaintiff suffered damages in the amount of $4,500,000. As indicated in the instructions, for the jury to arrive at this conclusion, it

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12. Plaintiff's position was memorialized in a letter to Judge Steel:

> We respectfully request that the jury be asked to determine the amount of plaintiff's damages, regardless of the answers to questions 3, 4 and 5. Plaintiff claims that, as a matter of law, CMOBC is liable for Chase Jamaica's breaches under the Edge Act, regardless of what answers the jury might give to questions 3, 4, and 5. If plaintiff later prevails on that point, but no verdict on the amount of damages had been rendered, a retrial would be necessary. That risk can be avoided, simply by taking a verdict on the amount of Rose Hall's damages regardless of the answers to questions 3, 4, and 5.

Letter from Paul P. Welsh, Esq. to Honorable Edwin D. Steel, Jr., March 4, 1983.

must have determined that in fact Holiday Inns did interfere, and that if Rose Hall had been able to sue Holiday Inns, it would have been awarded $4,500,000 in damages.[13]

In this action, however, Holiday Inns could not be sued directly for the interference since only Rose Hall (H.I.) was possessed of that chose in action; rather it was sued only on a conspiracy theory of liability. In order to impose liability on Holiday Inns, plaintiff was required to prove Holiday Inns conspired with Chase Jamaica in committing the wrongs described in Interrogatory No. 1 or Interrogatory No. 2. In answer to Interrogatory Nos. 5(A), (B) and (C), the jury found no conspiracy on the part of Holiday Inns. Therefore, judgment was entered in favor of Holiday Inns and against plaintiff on all claims.

Several possible bases for imposing liability on CMOBC for Chase Jamaica's wrongs were submitted to the jury in Interrogatory Nos. 3 and 4. The jury determined that CMOBC did not control Chase Jamaica's major policy decisions and actions relating to the events described in Interrogatory Nos. 1 and 2.[14] In addition, the jury found that CMOBC rebutted the presumption of control under the Edge Act,[15] established by Judge Steel in *Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F.Supp. at 1154-56.[16]

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13. The following figures illustrate the amount of damages:

ROLLINS' DEAL	CHASE JAMAICA'S SALE
$13,000,000 sale price for hotel	$9,505,000 sale price for hotel shares and land
-6,250,000 BNS first mortgage	-6,250,000 BNS first mortgage
$ 6,750,000 equity in hotel	3,255,000
	-1,000,000 land price
	$2,255,000 equity in hotel

$ 4,495,000 difference in equity in hotel

14. Interrogatory Nos. 3(1)(b) and 3(2)(b), *supra* p. 121.
15. For a more complete discussion see *infra* pp. 166-172.
16. Interrogatory Nos. 3(1)(a) and 3(2)(a), *supra* p. 121.

The only basis found by the jury for holding defendant CMOBC liable for the wrongs of its subsidiary, Chase Jamaica, is embodied in Interrogatory No. 4. An affirmative answer to that question constitutes a factual finding by the jury that during the injunction proceeding in Jamaica, Chase Jamaica made false representations to the Jamaican court which induced that court to defeat Rose Hall's attempts to enjoin the sale of collateral. The jury found that the Jamaican court was deceived by Chase Jamaica to believe there was no intention to close its operations and that it would remain in Jamaica with access to sufficient funds to satisfy any money judgment against it, when actual undisclosed plans to the contrary existed. The jury also found that this deception of the Jamaican court was controlled by CMOBC.

Based on the jury's answers to Special Interrogatories, the Court entered judgment for Holiday Inns against plaintiff on all claims and for plaintiff against CMOBC in the amount of six million dollars plus prejudgment interest. (Dkt. 773). Presently, the Court turns to the resolution of the parties' motions for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

II. *Legal Standards Applicable to the Parties' Post-Judgment Motions*

A. *Motions for Judgment Notwithstanding the Verdict*

This opinion addresses both plaintiff's and defendant CMOBC's motions for judgment notwithstanding the verdict under Fed.R.Civ.P. 50(b).[17] Both parties

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17. Fed.R.Civ.P. 50(b) provides in pertinent part:

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject

agree that "[t]he standards for granting a motion for judgment n.o.v. . . . are the same as those governing the direction of a verdict." 5A J. Moore, *Moore's Federal Practice* ¶50.07[2] (2d ed. 1981). A court should grant the motion "if, without weighing the credibility of the evidence, there can only be one conclusion as to the proper judgment, and it is contrary to the verdict." *Kerry Coal Co. v. United Mine Workers*, 488 F.Supp. 1080, 1094-95 (W.D.Pa. 1980), *aff'd*, 637 F.2d 957 (3d Cir. 1981), *cert. denied*, 454 U.S. 823, 102 S.Ct. 109, 70 L.Ed.2d 95 (1981). The Court is not free to "weigh the evidence, pass on the credibility of witnesses, or substitute its own judgment of facts for that of the jury." 488 F.Supp. at 1095 (citing 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2524 at 541-544 (1971)). The Court may overturn a jury verdict only where the facts and all inferences, drawn in the nonmoving party's favor, would not permit a reasonable man to come to the conclusion the jury reached. *Kerry Coal*, 488 F.Supp. at 1095 (citations omitted).

B. *Motions for a New Trial*

Rose Hall and CMOBC have also moved for a new trial on various grounds. Although Fed.R.Civ.P. 59 does not enumerate the grounds for a new trial,[18] the follow-

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to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict;. . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . .

18. Fed.R.Civ.P. 59 provides in pertinent part:

(a) *Grounds*. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in

ing have been recognized as general grounds for a new trial: the verdict is against the clear weight of the evidence; damages are excessive; the trial was unfair; and that substantial errors were made in the admission or rejection of evidence or the giving or refusal of instructions. 11 C. Wright & A. Miller, *Federal Practice and Procedure* §2805 at 37-38 (1973). A new trial motion on the ground that the verdict is against the weight of the evidence is to be distinguished from a motion for a directed verdict or for a judgment notwithstanding the verdict which raises the legal sufficiency of the evidence. In cases where a directed verdict or judgment notwithstanding the verdict would not be justifed, the trial court may set aside the verdict as contrary to the clear weight of the evidence and grant a new trial. 6A J. Moore, *Moore's Federal Practice*, §59.08[5] (2d ed. 1983). However, the Court should not set the verdict aside as against the clear weight of the evidence solely because it would have reached a different result as the trier of fact. *Id.* The Third Circuit Court of Appeals enunciated the test as follows:

> [S]ince the credibility of witnesses is peculiarly for the jury, it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict. The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's

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NOTES *(Continued)*

which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

> duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not.

Lind v. Schenley Industries, Inc., 278 F.2d 79, 89 (3d Cir. 1960), *cert. denied*, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960) (quoting 6 J. Moore, *Moore's Federal Practice*, (2d ed.) p. 3819).

The modern trend has been for courts to exercise a more limited judicial discretion in determining whether to set aside a verdict as against the clear weight of the evidence. *Schreffler v. Board of Education*, 506 F.Supp. 1300, 1306 (D.Del. 1981). The Third Circuit appellate court has distinguished new trials granted on this ground from those granted because of claimed errors or defects in the conduct of the trial, such as evidence improperly admitted or prejudicial statements by counsel. New trials granted because of the court's finding that the verdict was against the clear weight of the evidence will receive closer scrutiny on review. *Hourston v. Harvlan, Inc.*, 457 F.2d 1105, 1107 (3d Cir. 1972) (citing *Lind v. Schenley Industries, Inc.*, 278 F.2d at 90); *Schreffler v. Board of Education*, 506 F.Supp. at 1306.

C. *Standards Under Fed.R.Civ.P. 63*

Rule 63 provides for reassignment of a case upon the disability of the presiding trial judge, and states that if the successor judge "is satisfied that he cannot perform [the] duties [to be performed by the court after a verdict is returned] because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial." Fed.R.Civ.P. 63. If the trial judge is disabled after the jury returns a verdict but before motions for judgment notwithstanding the verdict or new trial are heard or decided, the successor judge may pass on these motions. "The latter then becomes vested with the same broad discretion to grant or deny such motions as was the trial judge." *Miller v. Pennsylvania Railroad Co.*,

161 F.Supp. 633, 636 (D.D.C. 1958), *rev'd on other grounds*, 272 F.2d 545 (D.C.Cir. 1959).

The parties agree there is no impediment to the determination of their judgment notwithstanding the verdict motions by the successor judge in this case. Complications arise, however, when new trial motions are based, as some of the present ones are, on the ground that the verdict is contrary to the clear weight of the evidence. In this situation, the court might itself have to weigh the evidence. Although determination of the "credibility of witnesses is peculiarly for the jury," 6A J. Moore, *Moore's Federal Practice*, §59.08[5] (2d ed. 1983), a judge may be required to pass on the credibility of witnesses in determining whether the verdict is against the clear weight of the evidence. *Ruggieri v. Beauregard*, 110 R.I. 197, 291 A.2d 413, 414 (Sup.Ct.R.I.1972).[19] "It is difficult to perceive the propriety of an exercise of such power where credibility is involved, the successor judge having neither seen nor heard the witnesses as they testified." 291 A.2d at 414. In some instances, scrutiny of the relevant transcript portions and documents may indicate that no credibility determinations are involved. Then, the successor judge can clearly rule on the new trial motions. *See e.g., Miller v. Pennsylvania Railroad Co.*, 161 F.Supp. 633, 642 (D.D.C.1958), *rev'd on other grounds*, 272 F.2d 545 (D.C.Cir.1959). However, if the successor judge finds that determining whether the verdict is contrary to the clear weight of the evidence involves questions of credibility which he should determine, he should, in his discretion, grant a new trial. *Ruggieri*, 291 A.2d at 414-15.

Several cases requiring a new trial because of the successor judge's inability to make credibility determinations involved bench trials where the presiding judge became disabled before making findings of fact. *See e.g.*,

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19. The Supreme Court of Rhode Island was applying a state rule of civil procedure patterned after Rule 63.

Brennan v. Grisso, 198 F.2d 532 (D.C.Cir. 1952); *Federal Deposit Insurance Corp. v. Siraco*, 174 F.2d 360 (2d Cir. 1949). These cases are distinguishable from the present one in which the Court's function is to review the jury findings to determine if they are against the clear weight of the evidence. Rule 63 cannot be read to require a new trial in every case in which the presiding trial judge becomes disabled before passing on post-judgment motions and a non-prevailing litigant thereafter urges that the existence of credibility issues fairly resolved by the jury nonetheless entitle it to a new trial. Rather, it provides the successor judge with discretion to grant a new trial if he feels it is necessary in light of the entire record and nature of the credibility issue.

Finally, in considering the motions for judgment notwithstanding the verdict and new trial, the parties have urged the successor judge to revisit certain rulings of Judge Steel. The general rule in this circuit and elsewhere is that "judges of coordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other." *TCF Film Corp. v. Gourley*, 240 F.2d 711, 713 (3d Cir. 1957). This is regarded as a "necessary rule of judicial comity to preserve the orderly functioning of the judicial process." *Id.* at 714. This rule, however, "is not absolute and all-embracing in its scope." *United States v. Mathies*, 350 F.2d 963, 964 (3d Cir. 1965). There are "exceptional circumstances," such as when the judge who made the original decision is, by death, resignation or disability, not available to reconsider his decision. In such a case, the successor judge is empowered to reconsider the previous ruling and reverse it if necessary. *TCF Film*, 240 F.2d at 714; *see also, Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 168-70 (3d Cir. 1982); *United States Gypsum Co. v. Schiavo Brothers Inc.*, 668 F.2d 172, 177 (3d Cir. 1981), *cert. denied*, 456 U.S. 961, 102 S.Ct. 2038, 72 L.Ed.2d 485 (1982).

This Court will be guided by these general principles in reviewing rulings made by Judge Steel. Such rulings will not be disturbed unless this Court is satisfied that they were erroneous and are material to the issues currently at hand.

III. *Liability of CMOBC—Deception of the Jamaican Court*

A. *Motion for Judgment Notwithstanding the Verdict*

CMOBC has moved for judgment notwithstanding the verdict on several grounds related to Interrogatory No. 4. First, defendant urges that the only permissible construction of the Special Verdict precludes a holding that separate corporate entities should be disregarded. Second, CMOBC contends that under Jamaican law, "no civil theory of recovery may be predicated in whole or in part upon allegedly false testimony in another judicial proceeding." Third, CMOBC claims that it cannot reasonably be concluded from all the evidence that plaintiff established fraud by clear and convincing proof. Fourth, CMOBC contends that plaintiff's proof is insufficient as a matter of law to support a finding that CMOBC controlled the alleged fraud on the court. These issues will be considered seriatim.

1. *Legal Sufficiency of the Special Verdict So As to Permit the Separate Existence of CMOBC to Be Ignored*

Defendant restates its argument that since the jury found in Interrogatory No. 3 that CMOBC did not control Chase Jamaica's wrongs referenced in Interrogatory Nos. 1 and 2, there can be no liability of CMOBC based on these wrongs. In essence, CMOBC contends that the jury's affirmative asnswer to Interrogatory No. 4 is insufficient to justify disregarding the separate corporate

entities and to hold CMOBC liable for the six million dollars in damages assessed by the jury.

This argument was treated in this Court's Judgment Opinion. The Court concluded that an affirmative answer to Interrogatory No. 4, encompassing as it does the fact that a misrepresentation occurred that deceived the Jamaican court into not issuing the injunction and that CMOBC controlled the making of that misrepresentation requires disregard of the separate corporate entities. Moreover, the Court held CMOBC would be liable for the full amount of damages, regardless of the jury's finding of no control in Interrogatory No. 3. CMOBC is not entitled to judgment notwithstanding the verdict on this ground. If the jury's findings in Interrogatory No. 4 are supported in the record, there is no reason to upset that determination. Conversely, if there has been a failure of proof, the verdict cannot stand.

2. *The Existence of a Cause of Action for False Testimony in the Jamaican Court*

CMOBC asserts that since under Jamaican law no civil theory of recovery can be predicated upon allegedly false testimony in another judicial proceeding, plaintiff's paragraph 54 claim must fail. CMOBC did not raise this issue in its September 13, 1982 Answering Brief in Opposition to Plaintiff's Proposal to Amend the Second Amended Complaint by Adding a New Paragraph 54 Thereto (Dkt. 524). As a result the question was not treated by Judge Steel in the opinion allowing Rose Hall's amendment. (Dkt. 568, 9/30/82). Defendant first raised the issue on October 5, 1982, in its Motion to Dismiss Paragraph 54 Pursuant to Rule 12(b)(6) on the ground that it fails to state a claim upon which relief can be granted. (Dkt. 602). Hearing was held on October 7, 1982, and Judge Steel orally ordered "that the hearing [and] determination thereof be deferred until trial pursuant to Rule 12(d)." (Dkt. 663, p. 14). The ruling was

formalized in an order dated October 8, 1982 (Dkt. 654) and trial commenced on October 12, 1982.

CMOBC again raised the issue in its November 30, 1982 Motion for a Directed Verdict and the accompanying briefs. (Dkt. 693, 694, 696, 697). Judge Steel again in effect deferred ruling on the issue by stating: "the motions will not be granted, but I can assure the litigants that when their motions for judgment N.O.V. [arise], if that should ever be required, very serious consideration will be given to those motions." (Dkt. 809, Tr. 6442-43). Presently, the Court undertakes the promised serious consideration of CMOBC's contention.

a. *Choice of Law*

As a preliminary matter, it must be determined which law governs the claim that Chase Jamaica, as a result of its control by CMOBC, perpetrated a fraud upon the Jamaican court. In a previous opinion in this case, Judge Steel held that Jamaican law governs the question of whether Chase Jamaica committed a fraud on the Jamaican court. (Dkt. 568, p. 7).

Plaintiff now asserts that the tort law of some unspecified jurisdiction within the United States governs the liability of CMOBC. Plaintiff relies upon Judge Steel's statement that the liability of CMOBC, as a stockholder, for the wrongs of its subsidiary is governed by the laws of the United States. (Dkt. 568, p. 8). In response, defendant correctly maintains that Judge Steel concluded, in his previous opinion, that under the *Restatement (Second) of Conflict of Laws* §145 (1971) or the Delaware common law choice of law rule Jamaican law would govern the question of whether Chase Jamaica committed a fraud on the Jamaican court. Judge Steel further held that whether CMOBC, as a parent Edge Act corporation, should be liable for the wrongs of Chase Jamaica would be governed by the laws of the United States. (Dkt. 568, p. 7-8). This Court subscribes

to Judge Steel's holdings and further finds that even if plaintiff were attempting to hold CMOBC liable for the fraud upon the Jamaican court as a tortfeasor and not as the parent of Chase Jamaica, Jamaican law would govern.

All of the events at issue with regard to the fraud took place in Jamaica. Under section 145 of the *Restatement (Second)*,[20] Jamaican law would clearly apply. The injury and the conduct causing the injury occurred in Jamaica. The relationship between Rose Hall and Chase Jamaica centered in Jamaica and Rose Hall never had any formal relationship with defendant CMOBC. The contacts of the parties with jurisdictions other than Jamaica are insufficient to warrant the application of their laws.

Jamaican law would apply under the common law rule in Delaware as well. In the case of intentional torts, such as fraud, the *lex loci delicti* rule requires a court to apply the substantive law of the state or, in this case, country where the defendant's wrongful conduct primarily occurred. *See Johnston Associates, Inc. v. Rohm and Haas Co.*, 560 F.Supp. 916, 918 (D.Del. 1983). It is beyond dispute that the fraud upon the Jamaican court occurred primarily, if not exclusively, in Jamaica.

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20. Section 145 provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

b. *Jamaican Law*

Having determined that Jamaican law governs the plaintiff's claim of fraud upon the court, the issue then becomes whether CMOBC can be held liable for the alleged fraud. This issue involves two questions: first, whether a cause of action against Edward C. Brown, Managing Director of Chase Jamaica,[21] Chase Jamaica or CMOBC in tort for civil damages arising from the perjured testimony is recognized under Jamaican law, and, second, whether CMOBC could be liable, under a disregard of corporate entity theory, for the wrongs of Chase Jamaica. If the first question is answered in the negative, one theoretically cannot reach the second question.

CMOBC argues that under Jamaican law no civil tort claim may be predicated in whole or in part upon allegedly false testimony in a judicial proceeding. Defendant asserts that Jamaican law forecloses a cause of action against a witness which is premised upon his statements made in court. Jamaican law, defendant also claims, forecloses holding anyone liable for the alleged perjury of another. Defendant concludes that even if Brown lied to the Jamaican court to the plaintiff's prejudice, Jamaican law is clear that no civil tort liability can be based thereon against Brown, Chase Jamaica or CMOBC.

In response, plaintiff maintains, without citing any authority, that "we doubt that [Jamaican law] goes as far as CMOBC suggests." (Dkt. 696, p. 16). In addition, plaintiff argues that the non-final nature of the Jamaican court's denial of the plaintiff's motion to enjoin the sale at issue precludes operation of Jamaican law prohibiting civil suits for damages arising from perjury.

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21. Brown, on cross-examination, made the critical representation to the Jamaican court which plaintiff contends constituted a fraud or deception. *See infra* pp. 135-136.

Upon review of the authorities cited by the defendant and independent examination of English and Jamaican law, the Court holds that under Jamaican law the plaintiff's claim against CMOBC for fraud upon the court fails to state a valid cause of action. Under Jamaican law, allegations of false testimony in a prior proceeding cannot be made part of any cause of action against a witness, a party, or a non-party, such as CMOBC.

The law in Jamaica and England[22] is that the testimony of a witness in a judicial proceeding is absolutely privileged from any subsequent civil action for damages.

> A witness is protected from civil proceedings in respect of the evidence which he gives in judicial proceedings, and in respect of things said or done in the course of preparing evidence for such proceedings. The protection is against actions of any sort, and is not limited to actions for libel and slander.

17 *Halsbury's Laws of England*, Evidence, ¶261 at 182 (4th ed. 1976) (footnotes omitted) (Dkt. 770A, Ex. N); *see Trapp v. Mackie*, [1979] 1 All E.R. 489, 490-91, 497 (House of Lords) (Dkt. 694, Ex. K); *Marrinan v. Vibart*, [1962] 1 All E.R. 869, 871 (Queen's Bench), *opinion adopted and aff'd*, [1962] 3 All E.R. 380 (Court of Appeal) (Dkt. 694, Ex. G); *Hargreaves v. Bretherton*, [1958] 3 All E.R. 122, 123, 125 (Queen's Bench) (Dkt. 694, Ex. G); *Watson v. McEwan, Watson v. Jones*, [1905] AC 480, 486 (House of Lords) (Dkt. 694, Ex. L). Recently, the Court of Appeal in Jamaica reaffirmed this fundamental rule:

> The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of the rule covers counsel, judge, parties and witnesses who in this respect are all equally protected.

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22. Jamaican courts accord precedential weight to the decisions of the English courts. *See* Judgment Opinion, p. 22 n. 37.

Bodden v. Brandon, [1965] Gleaner Law Reports 199, 203 (citation omitted). (Dkt. 694, Ex. C).

One of the principal purposes of the rule is to prevent disgruntled litigants from bringing vexatious suits against witnesses. As one court stated:

> The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would not be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions.

Marrinan v. Vibart, [1962] 3 All E.R. at 382 (quoting *Munster v. Lamb,* [1883] 11 Q.B.D. 588, 607). The rule also serves to avoid a multiplicity of actions in which the value or truth of the evidence would be tried over again. *Trapp v. Mackie,* [1979] 1 All E.R. at 497. Thus, it is clear that under Jamaican law, a civil damage action for perjury could not be brought against Brown.[23]

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23. In England, the absolute immunity of witnesses extends not only to those who actually testify at trial but to those who make statements prior to the commencement of proceedings, if the statements were made in the preparation of evidence for trial. *See Evans v. London Hospital Medical College* [1981] 1 All E.R. 715, 719-20 (Queens Bench) (Dkt. 694, Ex. F); *Marrinan v. Vibart* [1962] 3 All E.R. 380 at 383.

This immunity would clearly extend to Brown's employer, Chase Jamaica. Brown was not testifying in a personal capacity but as a representative of Chase Jamaica. Interrogatory No. 4 asks whether Chase Jamaica, not Brown, deceived the Jamaican court into not enjoining the sale of the collateral. A corporate entity can only speak through a representative. To hold that a witness testifying on behalf of a corporation is immune but that the corporation he represents may be liable would render the witness immunity rule meaningless in any case involving an entity rather than an individual. As stated above, one of the articulated current principal purposes of the rule is to protect witnesses from the vexation of defending actions brought by disappointed litigants. Any corporation who sent a representative to testify at a judicial proceeding would be subject to suit if the immunity of its witness-representative did not extend to the corporation itself. *See Evans v. London Hospital Medical College,* [1981] 1 All E.R. at 721 (Court found that witnesses and their employer enjoyed absolute immunity from suit in action for negligence and malicious prosecution premised upon statements made in preparation for criminal prosecution).

Having held that a cause of action against Brown and Chase Jamaica for perjury would not be valid under Jamaican law, the question remains whether CMOBC could be held liable for the alleged fraud on the court. This question requires a determination of whether the immunity enjoyed by an actual witness extends to third parties who did not testify at trial but who are alleged to have been involved in a scheme to perpetrate a fraud upon a court by procuring the false testimony of a witness. The parties have not cited nor has the Court found a Jamaican or English case that directly addresses this issue. An examination of the relevant authorities, however, indicates that a cause of action for fraud upon a court which is brought against a non-testifying third party would not be recognized under Jamaican law.

In *Marrinan v. Vibart,* [1962] 1 All E.R. at 871, the Court held that a plaintiff's claim for conspiracy to make false and defamatory statements was invalid where the claim was premised in part upon the statements made by the defendants in preparation for and at trial. The defendants were two police officers who were alleged to have conspired with another person to injure the plaintiff's reputation by making false and defamatory statements which were incorporated in evidence introduced at trial.

While the Court did not address the issue of the liability of a non-witness, the reasoning of the Court supports the conclusion that a cause of action against a non-participant, such as CMOBC, could not be premised upon a witness's statements introduced at trial. The Court found that the immunity rule could not be circumvented where the plaintiff's cause of action was premised in part upon the witnesses' allegedly perjured testimony. The Court stated that:

> The main contention on behalf of the plaintiff is that the gist of this action is not the defamatory statements made to the Director of Public Prosecutions, nor their repetition in evidence, but the antecedent combination or agreements to defame. It is argued that there is no authority for extending any immunity to such an agreement or combination. If, contrary to my judgment, the contention were correct that the gist of the tort of conspiracy is the conspiratorial agreement alone, it may be that the plaintiff would be entitled to succeed on this preliminary issue. In my view, however, this contention is plainly wrong; the gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt act causing damage. It is true that the crime of conspiracy is the very agreement of two or more persons to effect an unlawful purpose, and any overt acts done in pursuance of the

> agreement are merely evidence to prove the fact of the agreement. The tort of conspiracy, however, is complete only if the agreement is carried into effect so as to damage the plaintiff. Accordingly, the acts done in pursuance of the agreement are an integral part of the tort: *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*. It follows, therefore, that the plaintiff relies for part of his cause of action on the report of the defendants to the Director of Public Prosecutions and the evidence which they subsequently gave. These matters, by reason of the principles laid down in the authorities to which I have referred, cannot properly be made part of any cause of action.

Id. at 871 (citation omitted).

In the instant case, plaintiff's cause of action against CMOBC, set forth in Interrogatory No. 4, is based upon Brown's testimony given before the Jamaican court. The wrong alleged in the plaintiff's cause of action could only have been completed upon Brown's testifying. Since the plaintiff's cause of action set forth in Interrogatory No. 4 is premised on the fraud upon the court, it is unlikely that a Jamaican court would permit such a claim even though CMOBC was not a witness at trial.

The purposes underlying the rule warrant its application to non-participants as well as to participants at trial. If causes of action against non-participants were recognized, then disgruntled litigants would merely sue non-participants who had some relationship to the witness who allegedly testified falsely. Witnesses would be faced with the prospect that their testimony would form the basis of vexatious litigation directed against parties related to them who did not participate at the trial. Moreover, the purpose of avoiding multiplicity of actions in which the value or truth of evidence would be tried over again would be substantially diminished if the immunity rule could be circumvented merely by alleging

that non-participants at trial were somehow involved in the witness's fraudulent conduct before a court.

Finally, logic dictates that if a subsidiary cannot be held liable for a fraud on a court, the parent similarly cannot be liable. The inquiry must always turn on the reason and facts for which the separate corporate entities are sought to be ignored. If the underlying reason or facts are not actionable against the subsidiary, they likewise cannot be actionable against the parent through the device of ignoring the existence of separate corporate entities. Disregard of the corporate entity simply constitutes a method to hold a parent liable for the acts of its subsidiary. The theory does not, in and of itself, confer any additional substantive rights upon a plaintiff.

c. *American Law*

Having held Jamaican law governs the issue as presented to the jury in Interrogatory No. 4[24] and Jamaican law precludes liability by reason of immunized testimony, the inquiry is theoretically at an end. However, plaintiff contends the question presented to the jury in Interrogatory No. 4 was not an action based upon perjured testimony but upon the question of whether the corporate entities should be disregarded. Rose Hall claims that this issue is controlled by United States law. Specifically, Rose Hall asserts that defendant's characterization of plaintiff's theory is unduly restrictive. Plaintiff argues that its theory of alternative liability had its genesis in paragraph 54 of the Second Amended Complaint[25] and is not based upon false testimony in the Jamaican action, but rather simply established the false testimony as a predicate for disregard of the corporate entity. Plaintiff urges a "broad fraud" theory that:

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24. *See supra* p. 121.
25. *See supra* note 10.

> under all the circumstances, the defeat of Rose Hall's injunction by representations which (whatever the subjective intent with which they were made) were false in fact, combined with the subsequent stripping of Chase Jamaica, and the attempt to defeat Rose Hall's claims for damages by asserting Chase Jamaica's purported separateness here, *taken together*, constitute a fraud or injustice by means of the corporate entity which equity will prevent by disregarding the corporate entity.

(Dkt. 868, pp. 15-16) (emphasis in original).

Plaintiff's paragraph 54 "broad fraud" theory is composed of the following five elements: first, Chase Jamaica's cheap sale of the land and shares (Interrogatory No. 1) and refusal to cooperate in the lawsuit against Holiday Inns for interference (Interrogatory No. 2); second, false representations to the Jamaican court during the injunction proceedings that Chase Jamaica had substantial assets, would continue to do business in Jamaica and would be in a position to pay whatever damages might be awarded to Rose Hall; third, the Jamaican court's reliance on these representations in denying the plaintiff's petition to enjoin the sale; fourth, the closing and "stripping" of Chase Jamaica pursuant to plans in existence prior to the injunction hearings; fifth, CMOBC's manipulation of Chase Jamaica's defense of the Jamaican damage action in resisting plaintiff's attempt to stay that action pending resolution of the Delaware litigation. Rose Hall contends that these separate events, when aggregated, constitute fraud or injustice by means of purported separate corporate entities which equity will not allow.[26]

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26. The plaintiff went so far at oral argument as to assert that even without any misrepresentation to the court by Chase Jamaica and even assuming CMOBC stripped and emptied Chase Jamaica innocently, there would be sufficient unfairness to plaintiff to require ignoring separate corporate entities to provide a remedy. (Dkt.

Even if one started with Rose Hall's statement of the issue, plaintiff could not prevail for two independent reasons: first, examination of the trial record demonstrates unequivocally that plaintiff's characterization is erroneous in that the deceit on the Jamaican court was considered pivotal by all concerned; and second, given the central and critical nature of the false testimony to the Jamaican court, the American rule on witness immunity precludes this suit as presented.

(1) *Deceit on the Jamaican Court as Pivotal*

In allowing amendment of the complaint to add paragraph 54 on September 30, 1982, Judge Steel characterized the amendment as embodying plaintiff's "alternative fraud theory." (Dkt. 568, p. 2). As of the date of amendment, the fraud on the Jamaican court had become central. Judge Steel characterized plaintiff's position as "plaintiff's theory that the relationship between Chase Jamaica and its parent, [CMOBC], was such that this fraud, if proven, was relevant when considered with other evidence to render [CMOBC] liable. . . ." (Dkt. 568, p.1). At the time of allowance of the amendment, less than two weeks before trial commenced, it is fair to say that Judge Steel and the parties were already proceeding on the premise that plaintiff's alternative theory of liability was not viable but for the deceit on the Jamaican court.

This was confirmed by plaintiff during its day and a half summation to the jury. Plaintiff, in addressing the alternative theory of liability contained in Interrogatory No. 4, argued the deceit on the Jamaican court without referencing other aspects of paragraph 54, much less the theory now urged upon the Court. (Dkt. 853, Tr. 14,900-905; Dkt. 856, Tr. 15,388).

NOTES *(Continued)*

871, Tr. 53-54). Plaintiff's theory as applied finds no support in reported cases.

Moreover, plaintiff's request for charge on Interrogatory No. 4,[27] adopted almost verbatim by Judge Steel[28] with the addition of a requirement of control by CMOBC, trains exclusively upon the deception of the Jamaican court. Finally, Interrogatory No. 4 inquired of the jury: "4. Did Chase Jamaica, through its represen-

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27. Plaintiff's request for charge on Interrogatory No. 4 reads:

Independently of the above matters, Rose Hall contends CMOBC can be held liable for wrongs of Chase Jamaica on another ground. You have heard of the Jamaican action in which Rose Hall attempted to stop the sale of the Rose Hall (H.I.) shares and the land by an injunction. Chase Jamaica defeated Rose Hall's effort to get that injunction, on the basis that, if the land and shares were sold and the court later determined that the sale was wrongful, no ultimate harm would be done because, in that case, Rose Hall could recover money damages from Chase Jamaica. If you find that the Jamaican court was misled to believe there was no intention to close Chase Jamaica and that it would remain in Jamaica with ongoing access to sufficient assets to satisfy a money judgment, when actual undisclosed plans and intentions to the contrary existed, then you should disregard the separate corporate entity of Chase Jamaica and find that CMOBC is liable for the wrongs of Chase Jamaica. It does not matter whether the Jamaican court was misled deliberately, or only because those in actual control of CMOBC had formed decisions or intentions unknown to the lawyers and witnesses who spoke for Chase Jamaica. In either case, it would accomplish a wrong or inequity which the law does not allow if, after the defeat of the injunction on that basis, the corporate separateness of the no longer financially substantial subsidiary could be used to defeat Rose Hall's claim.

(Dkt. 764, p. 49).

28. The jury instruction on Interrogatory No. 4 as given by Judge Steel reads:

The fourth question reads as follows:

Did Chase Jamaica, through its representations, as a result of its control by CMOBC, deceive the Jamaican Court into not enjoining the sale of the collateral?

And you will answer yes or no to that question.

Independently of the above matters, Rose Hall contends CMOBC can be held liable for wrongs of Chase Jamaica on another ground. You have heard of the Jamaican action in

tations, as a result of its control by CMOBC, deceive the Jamaican court into not enjoining the sale of the collateral?" *Supra* p. 121. Since this interrogatory embodied plaintiff's theory of liability contained in paragraph 54 as presented to the jury, it is not surprising that plaintiff never objected to the form of Interrogatory No. 4 other than to the imposition of the control requirement. Accordingly, given its request for instruction on Interrogatory No. 4, there has been a waiver of the characterization of the theory it now vehemently asserts. *Cf. Reiner v. Bankers Security Corp.*, 305 F.2d 189 (3d Cir. 1962); *Halprin v. Mora*, 231 F.2d 197 (3d Cir. 1956).

Based upon the early characterization by Judge Steel, plaintiff's request for charge, plaintiff's summation and

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NOTES *(Continued)*

which Rose Hall attempted to stop the sale of the Rose Hall (H.I.) shares and the land by an injunction. Chase Jamaica defeated Rose Hall's effort to get that injunction, on the basis that, if the land and shares were sold and the Court later determined that the sale was wrongful, no ultimate harm would be done because, in that case, Rose Hall could recover money damages from Chase Jamaica.

If you find that the Jamaican Court was deceived by Chase Jamaica to believe there was no intention to close Chase Jamaica and that it would remain in Jamaica with ongoing access to sufficient assets to satisfy a money judgment, when actual undisclosed plans and intentions to the contrary existed, and if you find that its action was controlled by CMOBC, then you should disregard the separate corporate entity of Chase Jamaica and find that CMOBC is liable for the wrongs of Chase Jamaica.

In such a case, it would accomplish a wrong, fraud, or inequity which the law does not allow if, after the defeat of the injunction because of the Court's deception, the corporate separateness of the no longer financially substantial subsidiary could be used to defeat Rose Hall's claim.

Generally, plaintiff must prove its claims against the defendants and each element of those claims by a preponderance of the evidence. However, as to this claim by plaintiff that Chase Jamaica committed a deception or fraud, plaintiff must meet a higher standard and prove that claim by clear and convincing evidence.

(Dkt. 858, Tr. 15, 538-40).

plaintiff's failure to object to the form of Interrogatory No. 4, the Court concludes that defendant's characterization of the issue as tried and presented to the jury is far more accurate than that urged by plaintiff. Notwithstanding plaintiff's protestations, it is inescapable that deceit on the Jamaican court was pivotal to plaintiff's formulation and ultimate jury presentation. Actionability of deceit on the Jamaican court is controlled by Jamaican law, *supra* pp. 127-128, and that law would preclude the cause of action as tried to the jury and embodied in Interrogatory No. 4, *supra* pp. 128-130.

Thus far, the Court has held Jamaican law controls the existence of the cause of action embodied in Interrogatory No. 4 and the competing characterizations of the cause of action must be resolved in favor of defendant. However, even if American law controlled, the outcome would be the same because of plaintiff's inability to surmount the American rule of witness immunity.

(2) *The American Rule of Witness Immunity as Precluding Suit*

The Supreme Court has very recently articulated its recognition that "[t]he immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law." *Briscoe v. Lahue*, ___ U.S. ___, 103 S.Ct. 1108, 1113, 75 L.Ed.2d 96 (1983) (footnote omitted). The Supreme Court held that this rule has been imported into the American common law. *Id.* at 1113-15. Since the rationale for the American rule is largely the same as that for the English rule,[29] the Court assumes the American rule would be applicable to third parties such as CMOBC.[30] Unlike their English counterpart, some American jurisdictions have recognized an

29. *See supra* pp. 128-130; *see generally* Annot, 31 A.L.R. 1423 (1970); Annot. 54 A.L.R.2d 1298 (1957).

30. *See supra* pp. 130-131.

exception to the rule that perjury is non-actionable in a subsequent suit for money damages.[31] The exception to the rule is where perjury is merely a means to the accomplishment of a larger conspiracy or fraudulent scheme.[32]

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31. Plaintiff's citation of *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 54 S.Ct. 146, 78 L.Ed. 293 (1933); *Mas v. Coca Cola Co.*, 163 F.2d 505 (4th Cir. 1947); *Rixon Inc. v. Racal-Milgo, Inc.*, 551 F.Supp. 163 (D.Del. 1982); *Kirkland v. Mannis*, 55 Or. App. 613, 639 P.2d 671, *rev. denied*, 292 Or. 863, 648 P.2d 850 (1982); *Pappas v. Pappas*, 164 Conn. 242, 320 A.2d 809 (1973), to demonstrate the non-existence of a hard and fast rule which CMOBC never asserted ("the privilege must preclude judicial cognizance of perjury in prior proceedings, broadly and without exception,") (Dkt. 868 p. 18) is not helpful. Those cases all involve plaintiffs in a second proceeding who, notwithstanding their commission of some type of perjury in a prior proceeding, sought affirmative relief in the form of monetary damages or otherwise in a second proceeding involving at least some of the same issues as the tainted first proceeding. There is no relationship between barring a party seeking affirmative relief in the form of monetary damages by reason of unclean hands and determining whether false testimony can serve as a predicate for a second lawsuit.

32. *See Alberta Gas Chemicals, Ltd. v. Celanese Corporation*, 497 F.Supp. 637 (S.D.N.Y. 1980), *rev'd on other grounds*, 650 F.2d #9 (2d Cir. 1981) (not part of a larger fraudulent scheme); *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971) (alleged perjury part of a broader antitrust conspiracy), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972); *Morgan v. Graham*, 228 F.2d 625 (10th Cir. 1956) (alleged perjury by insurance company president claiming non-existence of insurance policy caused judgment plaintiff to be unable to recover on insurance policy); *Robinson v. Missouri Pacific Transp. Co.*, 85 F.Supp. 235 (D.Ark. 1949) (perjury merely part of larger conspiracy between employer and union to get employee plaintiff fired); *Alexander v. Peekskill*, 80 App. Div. 2d 626, 436 N.Y. S.2d 327 (1981) (refusal to apply exception of broader fraudulent scheme on facts); *Newin Corp. v. Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 333 N.E.2d 163, 371 N.Y.S.2d 884 (1975) (part of a larger fraudulent scheme); *Burbrooke Manuf. Co. v. St. George Textile Corp.*, 283 App. Div. 640, 129 N.Y.S.2d 588 (1954) (on facts stated in complaint held not part of larger fraudulent scheme); *see*

Assuming without deciding that the minority exception to the American witness immunity rule would be applicable, Rose Hall fails to come within the exception because as pleaded and presented there was no larger fraudulent scheme other than that factually asserted before the Jamaican court. The "cheap" sale and a significant portion of the interference claim were factually presented to the Jamaican court in the injunction proceeding. (PX 140, pp. 4-6, 10-13). The false representation on cross-examination was made to the Jamaican court during the injunction proceeding and the Jamaican court relied upon the same in denying the preliminary injunction. With regard to the alleged manipulation of the stay proceeding in Jamaica, Judge Steel had previously ruled:

> I do not find that the action which Chase Overseas [CMOBC] is alleged to have taken in the appellate court in Jamaica constitutes fraud. It was nothing more than [an] attempt to have the action tried in Jamaica rather than in Delaware. Plaintiff has made efforts in Delaware to have the action tried here rather than Jamaica. I do not consider the actions by either of the parties as to jurisdiction choice to be fraudulent.

(Dkt. 652, p. 1). There has been no demonstration that this ruling should be disturbed.

Only Rose Hall's assertion that Chase Jamaica somehow did something wrong when it sold its assets following its closing remains. Plaintiff's inflammatory label of "stripping the assets" obscures reality. Plaintiff does not dispute that CMOBC did not in any way profit or receive any assets from the "stripping" which in reality consisted

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also Dixon v. Bowen, 85 Colo. 194, 274 P. 824 (1929); *cf. Bethea v. Reid*, 445 F.2d 1163 (3d Cir. 1971) (conspiracy to violate civil and constitutional rights by use of perjured testimony held actionable without any discussion of witness immunity), *cert. denied*, 404 U.S. 1061, 92 S.Ct. 747, 30 L.Ed.2d 749 (1972).

of selling off Chase Jamaica's loan portfolio and paying off its non-contingent creditors, including other Chase entities. There is nothing remotely approaching fraud in a wholly owned subsidiary paying off creditors upon closing its business even though there is outstanding a contingent claim to be resolved at some future time via the vagaries of the litigation process.

Plaintiff has failed to establish a larger fraudulent scheme of which the perjury was only a part. Given the jury's answers to all other interrogatories, Rose Hall's tenuous claim to recovery from CMOBC rests entirely upon the misrepresentation to the Jamaican court and that court's denial of the preliminary injunction based upon that misrepresentation. Having failed to come within the exception to the American witness immunity rule, the Court concludes Rose Hall's cause of action embodied in Interrogatory No. 4 would be barred.

In summary, the Court concludes that the deception found by the jury in its affirmative answer to Interrogatory No. 4 is not actionable. The gravamen underlying Interrogatory No. 4 is properly characterized as seeking monetary damages by reason of a false representation made in a prior Jamaican judicial proceeding. Such a misrepresentation cannot serve as a basis for a cause of action under Jamaican, English or American law including the exception to the American rule. As a consequence, CMOBC is entitled to entry of judgment notwithstanding the verdict. Nonetheless, the Court will consider CMOBC's other arguments for judgment notwithstanding the verdict with respect to Interrogatory No. 4.

3. *Was a Fraud Established*

Plaintiff alleges that the deception on the Court included Brown's false representation to the effect that Chase Jamaica would be continuing in business as well as statements by counsel for Chase Jamaica, Norman

Hill, to the effect that Chase Jamaica would be ready and able to respond in damages to any subsequent finding of liability resulting from the sale. Plaintiff, however, has failed to present any authority for the proposition that counsel's arguments to the court can be considered evidence on which to base a fraud on the court claim. In addition, there is no evidence of record linking Hill's statements to the Jamaican court with CMOBC. Therefore, the court's examination of the fraud claim focuses on Brown's representation to the Jamaican court.

The evidence of the specific content of Brown's statement is surprisingly scarce and contradictory. The parties agree that the statement was made in answer to a single question on cross-examination of Brown by Dr. Lloyd Barnett, Rose Hall's counsel in the Jamaican proceeding. The issue then in essence is whether plaintiff has proved deception of the Jamaican court, under either the clear and convincing evidence standard or the preponderance of the evidence standard.[33] Stated differently, the issue is whether one answer, the precise content of which is unknown, to one question on cross-examination where the precise formulation of the question is unknown can constitute a misrepresentation to the Ja-

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33. The Court instructed the jury that the plaintiff had the burden of proving the falsity of the representation by clear and convincing evidence. (Dkt. 858, Tr. 15,540). Plaintiff disputes this higher burden of proof and contends that it is sufficient to prove fraud by a preponderance of the evidence. To arrive at this conclusion, plaintiff applies Delaware law by means of convoluted choice of law analysis. *See* Dkt. 868, pp. 61-65. As this Court reaffirmed above, the question of whether a fraud was committed on the Jamaican court is governed by Jamaican law. *See supra* pp. 127-128. The plaintiff does not dispute that under Jamaican law, the clear and convincing standard of proof applies to this issue. *See*, IX Wigmore *Evidence* §2498, p. 424 (Chadbourn Rev. 1981); *Bater v. Bater*, [1950] 2 All E.R. 458, 459. However, this Court has examined the record under both standards and would arrive at the same conclusion under either standard of proof.

maican court sufficient to "deceive the Jamaican court into not enjoining the sale of the collateral." (Interrogatory No. 4).

Dr. Barnett testified before this Court that he did not recall the exact question he asked Brown six years before. "But I suggested to him that there was a danger of Chase reducing its operations or closing its business in Jamaica. . . . I don't think I asked him if the decision had been made [to close the Chase Jamaica operation]. I don't think I put it as precisely as that. . . ." (Dkt. 799, Tr. 4273-74). Brown, on the other hand, seemed to vividly recall Barnett's question and his own reply thereto: "I was asked by Dr. Barnett, if, had Chase Jamaica made a decision to close, and I said no." (Dkt. 813, Tr. 7324).

Contemporaneous notes taken by presiding Justice Rowe and Norman Hill, counsel for Chase Jamaica, reveal different formulations of the exchange. Justice Rowe, following the practice of presiding judges in Jamaica who do not usually have the benefit of the transcription of proceedings by court reporters, took copious notes of the injunction hearings. These notes of Brown's statement on cross-examination contain the notation: "Chase has no intention of closing in Jamaica." (PX 629, p. 54).[34] Norman Hill's notes contain the phrase "not closing down." (Ct.Ex. 29; Dkt. 824, Tr. 9122).

On January 27, 1977, Justice Rowe issued his written opinion denying the injunction requested by plaintiff. In support of his conclusion that "the first defendant [Chase Jamaica] is in a position to pay whatever damages might be awarded to the plaintiffs in this action," Justice Rowe noted "[t]he first defendant stated that it proposes to continue in business in Jamaica." *Rose Hall Ltd., et al. v. Chase Merchant Bankers Jamaica Ltd., et al.*, Suit No. E-211 of 1976 (Sup. Ct. of Judicature of Jam. Jan. 17,

34. CMOBC continues to press its objection to the admission of Justice Rowe's notes, and currently asserts this was prejudicial error, requiring a new trial. (Dkt. 770, pp. 53-57). For treatment of this issue, see *infra* p. 141.

1977). (PX 140 at 15). Brown reiterated this formulation in a December 2, 1981 affidavit filed in the stay proceedings in the Court of Appeal in Jamaica. He stated: "when I gave evidence in the proceedings below, I truthfully represented that Chase Jamaica proposed to continue in business in Jamaica." (PX 638, ¶4(b)).

After Justice Rowe denied plaintiff's request for an injunction from the bench on November 22, 1976 and memorialized the same in his January 17, 1977 written opinion, the sale of the Rose Hall (H.I.) shares and 3000 acres of land was closed on November 18, 1977. The formal decision to close Chase Jamaica is noted in minutes of the Chase Jamaica board dated November 4, 1977 (PX 779) and the office was closed in February, 1978. (Dkt. 664, p. III-2).

Plaintiff contends that Brown's representation constituted a fraud on the Jamaican court because at the time Brown allegedly knew or must have known there was an intent to close Chase Jamaica. One of Brown's superiors, Francis Mason, Senior Vice President of CMB and Director of CMOBC, testified before this Court that "in late 1976 there was an intention to close Chase Jamaica if the environment in Jamaica did not change for the better." (Dkt. 836, Tr. 11,597). Although there is no evidence that Brown was privy to this intention, Brown did testify that before the Jamaican hearings he had known that the closing of Chase Jamaica "was one of the possibilities" and therefore he asked Ulises Giberga, a Chase Jamaica director and an officer of CMOC, if any decision had been made in that regard. Brown testified that Giberga assured him that no such decision had been made. (Dkt. 816, Tr. 7815). In addition, Brown stated in his affidavit to the Jamaican Court of Appeal that "[b]eginning several months prior to October 1976, the Directors of Chase Jamaica had under consideration, in view of the deteriorating economy of

Jamaica, the question of the profitability, present and projected, of Chase Jamaica's operations." (PX 638, ¶4(b)).

In the current posture of this case, the Court must assume that the jury found Brown was asked whether Chase Jamaica intended to remain in business as opposed to whether a decision had been made to close Chase Jamaica. As recapitulated above there was ample evidence from which the jury could conclude that the question put to Brown was phrased in terms of "intention" rather than "decision" to close. Brown's response was just plain wrong as to Chase Jamaica's intentions. As noted, at the time Brown testified in Jamaica, the evidence suggests at a minimum that Brown knew that Chase Jamaica might close if the deteriorating situation in Jamaica failed to improve. Moreover, the jury had before it PX 151, written by a Chase Jamaica director mere days after completion of the injunction proceedings referencing "plans for the eventual closing" of Chase Jamaica and establishing June of 1977 as the target date by which it should be accomplished.[35]

Stripped of all its verbiage, the simple facts are: first, Brown apparently testified that there was no intention to close; second, Brown conceded that he was aware that closing was one of the possibilities if conditions did not improve; third, as early as one week later, a memorandum was written referring to an intent to close; and fourth, Chase Jamaica did in fact close. As such, a reasonable juror had ample basis to conclude there was clear and convincing proof, and, *a fortiori*, proof by a preponderance of the evidence, that a misrepresentation had occurred in the Jamaican proceedings.

There is one disquieting note, however. Assuming an intent to defraud the court, presumably the strategy before Justice Rowe would have been to affirmatively proclaim Chase Jamaica's intent to remain in operation.

35. *See infra* pp. 138-139.

Rather than pursue such a course of action consistent with an intent to deceive the court, Chase Jamaica did not make such an affirmative representation. Chase Jamaica presented its balance sheets and then, in answer to one question on cross-examination, Brown gave an erroneous answer. Whether such a situation constitutes a fraud or deception is a close legal question. The operative finding must be an intent on the part of someone, whether Brown, Chase Jamaica, or Brown's supervisor, to deceive the court. Such a deception would be more likely to appear in the guise of affirmative testimony on direct examination or by affidavit rather than as an answer to one question on cross-examination. If the question had not been asked, the deception would never have occurred. On the other hand, since the issue of Chase Jamaica's continued operation was central to the necessity of preliminary injunctive relief, it was likely to assume that this would be the subject of inquiry. Any distinction between direct and cross-examination, therefore, is irrelevant in this context.

Since this Court has concluded that there is ample support for the jury's finding that Chase Jamaica committed a fraud, the Court now turns to the question of whether the jury's conclusion that CMOBC controlled the fraud is supported by the evidence.

4. *Did CMOBC Control the Fraud*

In this section, the Court considers the evidence relating to whether CMOBC controlled Brown's representation in the Jamaican court. Even though the Court has determined that the evidence supports a finding that Chase Jamaica deceived the Jamaican court,[36] no liability can be imposed on CMOBC if the jury's finding of

36. The Court engages in this inquiry even though it has previously held that CMOBC is entitled to judgment notwithstanding the verdict because no cause of action can be based on the deception of the Jamaican court.

control by CMOBC in this matter lacks support in the record.

The plaintiff concedes that "there is no direct testimony" linking CMOBC with the events occurring in the Jamaican court. (Dkt. 868, p. 39). Plaintiff argues, however, that "the circumstantial evidence powerfully shows that the relevant aspect of Chase Jamaica's defense before Justice Rowe must have been ultimately determined by Francis Mason, a CMOBC director." *Id.* To arrive at this conclusion, plaintiff begins by noting that Brown testified before this Court that in preparing the defense of the injunction suit, Chase Jamaica's attorneys sought information about the bank's future plans for continuing in business. (Dkt. 816, Tr. 7815). In response, Brown asked Giberga, Chairman of the Board of Chase Jamaica and a Vice President of both CMOC and CMB, a question to the effect of whether "any decision had been made regarding the closing of [Chase Jamaica]." *Id.* Brown claimed that Giberga "advised [him] that no decision had been made." *Id.*[37] Plaintiff next points to the "hierarchical character of the 'chain of command' from Mason to Giberga to Brown"[38] (Dkt. 868, p. 43), and the centralized administrative control of Chase Jamaica. This, together with Giberga's testimony that if a decision had been made by November 4, 1976 by an officer of CMB that Chase Jamaica should be closed, Giberga would have known about it (Dkt. 809, Tr. 6570), leads plaintiff to the conclusion that Giberga must have consulted with Mason before giving Brown his answer. Plaintiff makes this purely speculative assumption, not upon evidence of record, but because Mason was Giberga's boss and the ultimate decision-maker on the closing of Chase Jamaica. Plaintiff asserts that the jury "had the right to infer that when Brown consulted

37. Giberga testified that he did not recall the conversation, but had no reason to doubt that it occurred. (Dkt. 810, Tr. 6685).

38. *See* testimony of Warren Leonard, president of CMOBC at Dkt. 794, Tr. 3325.

Giberga, he learned what Mason's real position was [that there was an intention to close Chase Jamaica if the environment did not improve (Dkt. 836, Tr. 11,597)] . . . and that Mason and Giberga had consulted together and decided what positions Brown and the lawyers should take." (Dkt. 868, p. 44).

The jury could not make such an inference, unsupported by even a shred of evidence. The clear weight of the evidence indicates that this consultation up the ladder is pure speculation on plaintiff's part. In fact, plaintiff never even argued this theory before the jury. In addition, there is uncontradicted testimony by Mason that he played no part whatsoever in the defense of the Jamaican action (Dkt. 836, Tr. 11,544) and that he never heard of the existence of the Jamaican lawsuit until questioned about it on his deposition in this action in 1981. (Dkt. 836, Tr. 11,599). Therefore, any jury finding of CMOBC's control of the alleged deception in the Jamaican court could not stand on this ground.

Rose Hall also contends that the jury finding of control by CMOBC is supported by memoranda which indicate that the closing of Chase Jamaica was planned at the time Brown was assuring Justice Rowe of the contrary. However, close scrutiny of these memoranda indicates that although they do reveal an earlier intent to close the bank, they fail to provide the crucial link between CMOBC and the fraud on the court.

A memorandum by Augusto Sigarreta, director of Chase Jamaica and vice president of CMOC, to John Pershing, vice president of CMOC, written on December 3, 1976, just days after the completion of the injunction proceedings, indicates that CMOC had "plans for the eventual closing of the Merchant Bank in Jamaica." (PX 151). It further provides: "As for the timing of the closing is concerned, I feel that we should be out of Jamaica next

year around the end of June." *Id.*[39] This memorandum fails to provide any support for a conclusion that CMOBC was aware of this or had any such plans of its own. A subsequent letter to Sigarreta from Mary Ellen Collins, second vice president of CMB, dated April 20, 1977, refers to plans to "liquidate the Merchant Bank." (PX 220). Again, this memo, written months after the Jamaican proceeding, fails to implicate CMOBC in any way.

Warren Leonard, the current president of CMOBC, testified that he received a January 24, 1978 memorandum from David Whitaker, vice president of CMOC. (Dkt. 794, Tr. 3178-80). The memorandum includes the following information: "The main objective of Chase Merchant Bankers Jamaica, Ltd. (CMBJ) for the last two years has been to dispose of its assets without incurring further losses." (PX 182).[40] Although the statement would indicate that a decision to close the bank was taken in early 1976, it does not serve as evidence that CMOBC made the decision or was aware of it prior to the injunction proceedings. Equally important, it fails to show any control by CMOBC of the representations made to the Jamaican court.

Finally, a January 5, 1978, CMOBC file memo by James P. Hansen, second vice president of CMOBC, recording a conversation with Dave Whitaker, vice president of CMOC, notes: "Decision to close office was made about a year and a half ago." (PX 177)[41] This memorandum could be read by the jury as indicating that the decision to close the subsidiary was made around June of 1976, and that CMOBC, or at least CMOC, was aware of it. However, it again fails to provide any evidence of the essential element, that is, CMOBC's involvement in or control of the proceedings before the Jamaican court.

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39. Contrary to CMOBC's counsel's recollection at oral argument, this memorandum, as well as subsequent ones, was admitted without objection on November 8, 1982. (Dkt. 794, Tr. 3196).

40. *Id.*, Tr. 3178.

41. *Id.*, Tr. 3190.

The jury could fairly conclude from these memoranda that CMOC had made a decision, or had knowledge of a decision to close Chase Jamaica prior to the Jamaican injunction proceedings. It could also conclude that CMOC was involved in a deception on the Jamaican court through Giberga who, it will be remembered, talked to Brown. Therefore, the jury might have had a sufficient basis for concluding that CMOC defrauded the Jamaican court by misinforming Brown. However, CMOBC, and not CMOC, is the defendant in this action. The record does not provide a sufficient basis for a finding that CMOBC was involved in the fraud.[42] Plaintiff introduced no evidence of CMOBC's direct control of Chase Jamaica in this representation nor of indirect control in this matter through CMOC.

The Court instructed the jury that for purposes of finding control of CMOBC in Interrogatory No. 3,[43] "it would not matter whether CMOBC exercised control over Chase Jamaica directly by CMOBC itself or indirectly by Chase Manhattan Bank N.A. and/or CMOC." (Dkt. 858, Tr. 15,537). As evidence of this indirect control, plaintiff introduced two manuals, the Credit Policy Guide (PX 323) and the Organization & Policy Guide (PX

42. The Court notes that Mason was on the boards of both CMOBC and CMOC. (Dkt. 836, Tr. 11,524-25). Mason admits that he knew of the possibility that Chase Jamaica would close. (Dkt. 836, Tr. 11,597). There is still, however, no link between CMOBC and the proceedings in the Jamaican court. *See supra* p. 138.

43. Interrogatory No. 3 reads as follows:

Did CMOBC control Chase Jamaica's major decisions and actions relating to its actions under Question 1. or its actions under Question 2.?

As to Question 1.

(a) because of the Edge Act theory and/or — Yes__ No__

(b) independently of the Edge Act — Yes__ No__

As to Question 2.

(a) because of the Edge Act theory and/or — Yes__ No__

(b) independently of the Edge Act — Yes__ No__

324), and testimony of various officers from Chase entities pertaining to these guides.[44] These manuals provide some evidence that would be relevant to the question of general control of Chase Jamaica by CMOBC through CMOC.[45] There are strong indications that the jury considered general control with respect to question 3.[46] However, the jury concluded that there was insufficient evidence to find that CMOBC, either directly or through CMB and/or CMOC, controlled the specific Rose Hall transactions at issue in Interrogatory No. 3.[47]

There is markedly less evidence in the record to support a finding that CMOBC indirectly controlled the fraud on the Jamaican court through CMOC. The policy manuals, relating to loan policy and administration, offer no guidance on control of testimony before a tribunal in an injunction proceeding. They do not in any way support a finding that CMOBC delegated any control to CMOC in this regard. Therefore, the jury could not have reasonably concluded on the basis of the policy manuals that CMOBC directly or indirectly controlled the alleged deception of the Jamaican court.

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44. This evidence is summarized in plaintiff's November 30, 1982 letter to the Court.

45. *See* discussion *infra* pp. 168-169.

46. During its deliberations the jury sent the following inquiry to the Court:

> Question 3:
>
> Do you mean control of Chase Jamaica in the general (overall) sense or do you mean control of the Rose Hall transaction only. (Ct.Ex. 75).

The Court replied as follows:

> Question 3. inquires about CMOBC's control, if any, over Chase Jamaica's major policy decisions and actions involved in Question 1. and/or Question 2. of the interrogatories. In short, the control inquired about in Question 3. is limited to the major policy decisions and actions involved in Question 1. and/or Question 2; however, control in the general (or overall) sense may be, but is not necessarily, relevant to your consideration of Question 3. (Ct.Ex. 76).

47. *See* discussion *infra* pp. 170-172.

During the July 15, 1983 hearing on CMOBC's motion for judgment notwithstanding the verdict, Rose Hall made additional arguments, which are not included in its massive brief, to support the jury's finding that CMOBC controlled the alleged fraud on the court. Plaintiff claims that Brown himself embodied CMOBC's presence in the Jamaican courtroom. In support, plaintiff points to a line in Justice Rowe's notes (PX 629, p. 45) indicating that Brown testified he was sent to Jamaica by CMOBC, and to a letter in evidence (PX 202) which plaintiff claims shows that CMOBC paid Brown's salary. Plaintiff seems to be making a novel argument that because Brown was sent to Jamaica by CMOBC and CMOBC paid his salary, he was CMOBC's agent in Jamaica. Plaintiff never argued this theory to the jury. Moreover, Brown testified in this Court that the line in Justice Rowe's notes was erroneous. He was sent to Jamaica by Chase Manhattan Bank and recalls testifying to that effect before the Jamaican court. (Dkt. 816, Tr. 7779). Brown also explained in great detail the complex pay system referred to in PX 202. (Dkt. 816, Tr. 7780-89). He stated in essence that although from PX 202 it appeared that CMOBC was paying his salary, it actually was not. The system was established to protect Chase Jamaica employees against fluctuations in the rate of currency exchange. (Dkt. 816, Tr. 7785). Even if the jury disbelieved Brown's testimony explaining these exhibits, there would not be sufficient record support for a finding that CMOBC controlled the specific acts constituting a fraud on the Jamaican court. For all of these reasons, the Court concludes that the jury could not reasonably find that CMOBC controlled the fraud on the Jamaican court. This lack of control would by itself suffice to grant CMOBC's motion for judgment notwithstanding the verdict.

In summary, while rejecting some of defendant's grounds for judgment notwithstanding the verdict, the Court has found defendant is entitled to entry of judg-

ment on two separate independent grounds: first, under the applicable Jamaican and American law, no independent cause of action against a third party can be based upon perjury in a prior judicial proceeding; and second, the record is completely devoid of any evidence that the fraud on the Jamaican court was committed as a result of control of Chase Jamaica by defendant CMOBC. Therefore, plaintiff's paragraph 54 claim fails for these reasons and CMOBC's motion for judgment notwithstanding the verdict is granted.

B. *CMOBC's Alternative Motion for New Trial*

CMOBC asserts several grounds for a new trial as alternative relief if the Court denies its motions for judgment notwithstanding the verdict. Although the Court has granted CMOBC's judgment notwithstanding the verdict motions, it must also rule on the new trial motions and determine "whether [they] should be granted if the judgment is thereafter vacated or reversed, and . . . specify the grounds for granting or denying the motion[s] for new trial." Fed.R.Civ.P. 50(c)(1).

1. *Prejudice to CMOBC From the Court's Grant of Plaintiff's Paragraph 54 "Fraud on the Court" Amendment*

CMOBC urges that it is entitled to a new trial because it was severely prejudiced by the Court's allowance of plaintiff's amendment on the "eve of trial." In addition, CMOBC argues that allowance of the amendment amounted to an abuse of discretion because of plaintiff's inexcusable delay in asserting the new claim. Defendant asserted identical arguments in its briefs in opposition to the proposed amendment. (Dkt. 502, 524). These arguments were fully considered by Judge Steel and are treated in some detail in his September 30, 1982 opinion allowing the amendment. (Dkt. 568).

It is well established that the allowance of amendments under Fed.R.Civ.P. 15(a) lies in the discretion of the trial judge, and is not subject to review on appeal except for abuse of discretion. 3 J. Moore, *Moore's Federal Practice* ¶15.08[4] (2d ed. 1982). Under the terms of the rule itself, the district court is to allow such amendments "freely." In making its determination, the Court is to consider prejudice to the other party and undue delay or bad faith on the part of the movant. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed. 2d 222 (1962). The Supreme Court has forcefully stated:

> the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id.

Judge Steel was guided by these considerations in his opinion. (Dkt. 568). The Court does not find that Judge Steel's decision to allow the amendment amounts to an abuse of discretion and therefore holds that CMOBC would not be entitled to a new trial on this ground.

CMOBC further contends that the Court's refusal to grant a continuance requested in part for discovery on the new claim (Dkt. 603, 636) was prejudicial error. Judge Steel's denial does not amount to an abuse of discretion requiring a new trial. There are some indications that facts relevant to the fraud issue had been pursued prior to the date of the amendment.[48] In addition, the Delaware action began on October 12, 1982 and was tried four days a week. CMOBC was free to use the

48. CMOBC itself refers to the "full record plaintiff made before [Jamaica's Court of Appeal] of the claim that Chase Jamaica had committed a fraud." (Dkt. 770, p. 53 n.*). The appeal of the stay proceeding before that court took place in November and December 1981, and February, 1982.

remaining time to conduct any interviews or depositions it deemed necessary. Other discovery was conducted during the trial in that fashion.

2. *Admission of Justice Rowe's Notes*

CMOBC contends that the admission of Justice Rowe's notes of the Jamaican injunction proceeding (PX 629)[49] was prejudicial error, requiring a new trial. Plaintiff offered the notes in evidence primarily to prove the content of Brown's representation to the Jamaican court about Chase Jamaica's plans for continuing in business. The critical phrase recording Brown's testimony on cross-examination reads: "Chase has no intention of closing in Jamaica." (PX 629, p. 54). This evidence constituted part of plaintiff's proof of the alleged fraud on the Jamaican court committed by Chase Jamaica through Brown.

CMOBC objected to the notes on grounds of inadmissible hearsay and improper authentication under Fed.R.Evid. 902(3). Judge Steel originally excluded the notes from evidence (Dkt. 797, Tr. 3779-82), but after hearing testimony from plaintiff's witness, Justice Robinson, admitted them provisionally subject to final certification being obtained by plaintiff. (Dkt. 806, Tr. 5733-37). CMOBC's motion to strike the notes from evidence was subsequently denied. (Dkt. 715).

Other evidence was also introduced bearing on the content of Brown's testimony before the Jamaican court. This included: contemporaneous notes taken by Chase Jamaica's counsel, Norman Hill (Ct.Ex. 29; Dkt. 824, Tr. 9122); Justice Rowe's January 27, 1977 written opinion denying the injunction (PX 140 at 15); Brown's December 2, 1981 affidavit filed in the Court of Appeal in Jamaica (PX 638, ¶4(b)); and testimony by Brown and Dr. Barret, Rose Hall's counsel who conducted the cross-

49. *See supra* p. 135.

examination. (Dkt. 799, Tr. 4273; Dkt. 813, Tr. 7234).[50] The memorialization was formulated differently in each piece of evidence, but as CMOBC itself notes, "the difference between the two (or more) versions of what Brown said seven years ago is largely one of emphasis." (Dkt. 770, p. 54). Even if Justice Rowe's notes had been excluded from evidence, the record was replete with sufficient evidence for the jury to conclude Brown represented to the Jamaican court that Chase Jamaica proposed to continue in business. Therefore, CMOBC has failed to show that if any error were made in the admission of PX 629, such error affected its "substantial rights." Fed.R.Civ.P. 61.[51] CMOBC is not entitled to a new trial on this ground.

3. *Admission of Evidence Relating to the Stay Proceedings*

CMOBC asserts that the admission of Justice Parnell's opinion granting Rose Hall a stay of the Jamaican damage action pending resolution of the Delaware action (PX 141) and the opinion of the Court of Appeals affirming that decision (PX 641) was erroneous and prejudicial, entitling CMOBC to a new trial. These opinions contain material on the issue of CMOBC's involvement in the stay proceedings. Judge Steel had previously ruled that the portions of paragraph 54 alleging that

50. For a more extensive discussion of the content of each item, see *supra* pp. 135-136.

51. Fed.R.Civ.P. 61 provides:

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

CMOBC "manipulated Chase Jamaica's defense of the Jamaican action . . . seeking unfair litigation advantage to itself in this case" [52] did not state a claim for fraud but were relevant to the issue of whether CMOBC should be held liable for Chase Jamaica's wrongs. (Dkt. 652). It was on this basis that Judge Steel admitted PX 141 and pages 31-32 of PX 641. (Dkt. 779, Tr. 161; Dkt. 799, Tr. 4264-66). CMOBC did not make a Fed.R.Evid. 403 prejudice objection at trial nor has it made a convincing argument that admission of these exhibits was erroneous. Moreover, defendant has again failed to meet its burden of showing that if any error were made in the admission of these opinions, it affected "substantial rights" of the parties. Fed.R.Civ.P. 61. Therefore, the order of a new trial on this ground is not warranted.

4. *The Purported Ambiguity in Special Interrogatory No. 4 and Allegedly Erroneous Instructions*

CMOBC argues that Special Interrogatory No. 4 was ambiguously worded so that the issue of CMOBC's control of Chase Jamaica was predetermined by the Court. This Court treated this claim fully in its Judgment Opinion and concluded that under all of the circumstances, Interrogatory No. 4 was not ambiguous, and the issue of control was determined by the jury. (566 F.Supp. at 1567-70). In the Judgment Opinion, this Court also disposed of defendant's contention that the cheap sale and loss of interference claim damages, which the jury found totaled six million dollars, did not flow from the fraud on the Jamaican court. The Court's reasoning and finding that the damages did flow from the alleged fraud are set out at pages 1570-74 of that opinion. *Id.* There is no reason to disturb those rulings. Therefore, CMOBC would not be entitled to a new trial on either of these grounds.

52. For the full text of paragraph 54, see *supra* note 10.

CMOBC also asserts that the jury instructions on this issue were erroneous, and that the Court's refusal to give a certain instruction proposed by CMOBC was error entitling it to a new trial.[53] Specifically, CMOBC points out the contrast between the brief instruction on control under Interrogatory No. 4 and the more lengthy one on control under Interrogatory No. 3. Although the instruction under Interrogatory No. 4 was brief, it was obvious that the definition of control which was read to the jury with reference to Interrogatory No. 3 was to apply to control in Interrogatory No. 4 as well. Such a reading is consistent with the following instruction to the jury: "You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole." (Dkt. 858, Tr.15,484). The jury was instructed in relation to Interrogatory No. 3, in pertinent part, as follows:

> A parent corporation may be liable for the wrongs of its subsidiary if it controls the subsidiary in the commission of those wrongs or if it causes that subsidiary to be controlled from outside itself, as to major policy decisions and actions as to those wrongs, and without regard to the subsidiary's corporate offices and structure.
>
> This outside control must amount to complete domination of the subsidiary's major policy decisions and actions so that the subsidiary at the time had no separate mind, will, or existence of its own.
>
> For purposes of this principle, it would not matter whether CMOBC exercised control over Chase Jamaica directly by CMOBC itself, or indirectly by Chase Manhattan Bank, N.A., and/or CMOC. In

53. CMOBC's proposed instruction reads as follows: "I instruct you that CMOBC cannot be held liable for any alleged fraud or other alleged acts by Chase Jamaica unless that fraud was controlled or commited by CMOBC itself, through the manipulation of the separate existence of Chase Jamaica." (Dkt. 751, p. 10).

> either event, if you find that CMOBC controlled Chase Jamaica in a way that disregarded the subsidiary's corporate offices and structure, and that Chase Jamaica's major policy decisions and actions involved in this lawsuit were thus taken in disregard of Chase Jamaica's corporate offices and structure, then you should find CMOBC liable for the wrongs of Chase Jamaica.

(Dkt. 858, Tr. 15,536-37). It cannot be said that Judge Steel committed clear error requiring a new trial because he failed to repeat this explanation of the control concept with reference to Interrogatory No. 4, a mere two pages later. Neither CMOBC nor plaintiff requested repetition of the definition of control instruction. Moreover, plaintiff offered no additional definition of control to be included in the instructions on Interrogatory No. 4, while the additional charge proposed by CMOBC not only would not be correct or adequate, but also fails to define control.

CMOBC also asserts a novel theory which it claims justifies the grant of a new trial. Defendant claims that the "erroneous instruction under Special Interrogatory No. 3 as to the *presumption* of control of Chase Jamaica by CMOBC purportedly mandated by the Edge Act" [Dkt. 858, Tr. 15,537-38] confused the jury and suggested "that CMOBC *presumably* controlled Chase Jamaica's actions in the Jamaican injunction proceeding (and that CMOBC had the burden to prove otherwise). . . . " (Dkt. 770, pp. 59-60).

The short answer to this new claim is that the Court repeatedly charged the jury that plaintiff had the burden of proving its claims by a preponderance of the evidence unless otherwise specifically noted. (Dkt. 858, Tr. 15,501-02, 15,515, 15,540). The Edge Act presumption was referenced only under part of Interrogatory No. 3. Judge Steel was careful to differentiate between the two theories of control. This control under the Edge Act was

inquired about in Interrogatory No. 3(a), and control independent of the Edge Act was referenced in Interrogatory No. 3(b). The jury was instructed as to each theory separately. (Dkt. 858, Tr. 15,535-38). In addition, CMOBC at no time objected to the instructions on the ground that language excluding the Edge Act presumption was needed in the Interrogatory No. 4 instruction. For these reasons, no new trial is warranted on this ground.

5. *Jury Findings Against Clear Weight of Evidence as to CMOBC's Control of the Fraud*

Finally as to the fraud issue, CMOBC asserts that the Court must order a new trial because the jury's conclusion that any false testimony was given is against the clear weight of the evidence. Furthermore, defendant claims that credibility issues are raised under the fraud claim such that a successor judge must grant a new trial under Fed.R.Civ.P. 63.

As one ground for granting judgment notwithstanding the verdict for CMOBC on the fraud claim, the Court determined that no reasonable person could conclude that fraud was controlled by CMOBC.[54] If the grant of judgment notwithstanding the verdict should be reversed on appeal, there would have to be a new trial limited to the issue of CMOBC's control of the fraud presented by Interrogatory No. 4. The jury's finding in Interrogatory No. 4 is against the clear weight of the evidence for the reasons discussed in holding that the misrepresentation of Chase Jamaica was not controlled by CMOBC.

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54. *See supra* pp. 137-140.

IV. *Liability of CMOBC—Interference Claim*

A. *Motion for Judgment Notwithstanding the Verdict or New Trial*

CMOBC attacks the jury's finding that Chase Jamaica (and therefore CMOBC) is liable to plaintiff in the amount of 4.5 million dollars for its refusal to cooperate in the interference lawsuit against Holiday Inns. (Interrogatory Nos. 2 and 6). Defendant asserts several grounds which it claims justify judgment notwithstanding the verdict in its favor or, alternatively, a new trial on this issue. The Court has already determined that CMOBC is entitled to judgment notwithstanding the verdict on the deceit on the court claim and therefore cannot be held responsible for any of Chase Jamaica's wrongs found by the jury in Interrogatory Nos. 1 and 2. Therefore, consideration of the interference issue is not necessary to the present judgment. However, under Fed.R.Civ.P. 50(c), the Court must rule on new trial motions in the event that the judgment is vacated or reversed on appeal.[55] It would seem to be within the spirit of this rule to also determine the remaining grounds of defendant's judgment notwithstanding the verdict motion. Each ground will be addressed separately.

1. *Chase Jamaica's Duty to Act in Good Faith When Foreclosing on Collateral—Lawsuit Against Holiday Inns*

CMOBC contends that as a matter of law, Chase Jamaica owed no duty to plaintiff to assist in a lawsuit against Holiday Inns either by itself instituting suit, by restructuring its sale to the U.D.C. to a sale of assets rather than a sale of the shares of Rose Hall (H.I.), or by assigning the claim to Rose Hall before transferring the stock to the U.D.C. None of these actions, defendant maintains, would be required of Chase Jamaica which,

55. *See supra* p. 140.

as pledgee of the shares, had the right to sell the collateral upon plaintiff's default on the loan. Defendant points to the share hypothecation agreement (PX 473E), which provides that if plaintiff defaulted on the loan, Chase Jamaica could "sell by public or private sale or otherwise deal with the securities in such manner as it [saw] fit." (*Id.*, ¶2).

As CMOBC notes, the applicable common law requires the pledgee to dispose of the collateral in "good faith." The jury was instructed, "[i]n exercising its power of sale, a bank owes a duty to its borrower to act in good faith, and not in reckless disregard of the borrower's interests, and to take reasonable precautions to obtain the best available price for the collateral on the date of sale." (Dkt. 858, Tr. 15,519). The jury was further instructed: [i]f the bank's interests, as it sees them, conflict with those of the borrower, the bank is entitled to give preference to its own interests provided it does so in good faith." (Dkt. 858, Tr. 15,521). Nothing has been proffered to indicate this statement of Jamaican law was incorrect. In light of these controlling principles of Jamaican law, Judge Steel properly left to the jury the question of whether Chase Jamaica should have assisted Rose Hall in the lawsuit against Holiday Inns. While defendant is correct in asserting that a bank has no absolute duty to aid a defaulting borrower in a lawsuit, it does have a duty to act in good faith and not in reckless disregard of its borrower's interests in pursuing the lawsuit if this would not have interfered with its attempt to conclude a legitimate sale with the U.D.C. (Dkt. 858, Tr. 15,525). The issue was properly submitted to the jury. Accordingly, CMOBC is not entitled to judgment notwithstanding the verdict on this issue.

2. *Res Judicata Effect of Certain Statements in Justice Rowe's Opinion*

CMOBC currently seeks to inject a new theory as a ground for overturning the jury's finding that Chase Jamaica wrongfully prevented plaintiff from suing Holiday Inns for interference. *See* Interrogatory No. 2, *supra* p. 9. Defendant points to the following language in Justice Rowe's written opinion denying the injunction:

> Complaint is made by the plaintiffs that the [first] defendant [Chase Jamaica] refused permission for the plaintiffs to bring an action against Holiday Inns in the name of the second defendant [Rose Hall (H.I.)], for unlawful interference in the plaintiffs' negotiations with the Urban Development Corporation. That refusal, taken by itself, or cumulatively with the plaintiffs other complaints is in my view no evidence of bad faith on the part of the defendants. The defendants must perforce continue to do business with Holiday Inns and it would be inimical to the defendants interests to be engaged in a lawsuit against Holiday Inns.

Rose Hall, Ltd., et al. v. Chase Merchant Bankers Jamaica Ltd., et al., Suit No. E-211 of 1976 (Sup.Ct. of Judicature of Jam., Jan. 17, 1977) (PX 140, pp. 12-13). Defendant claims that this statement by Justice Rowe should be accorded *res judicata* effect so as to preclude any claim by plaintiff that Chase Jamaica had a duty to assist in a lawsuit against Holiday Inns.

This Court does not agree that this dictum in the opinion denying the preliminary injunction should be accorded *res judicata* effect. First, an expression of opinion on a component of "probability of success" in a preliminary injunction context is just that, *i.e.*, a preliminary determination subject to revision in the final merits determination. Second, the primary issue resolved by Justice Rowe's disposition of the case was

whether "the first defendant [was] in a position to pay whatever damages might be awarded to the plaintiffs in this action." *Id.* at 15. Consequently, the question of whether Chase Jamaica should have made the lawsuit available to Rose Hall was properly submitted to the jury. Defendant's theory of *res judicata* cannot serve as a basis for grant of judgment notwithstanding the verdict or new trial.

3. *Chase Jamaica's Legitimate Interest in Avoiding Litigation Between Rose Hall (H.I.) and Holiday Inns*

The Court instructed the jury that Chase Jamaica had no duty to make the interference claim against Holiday Inns available to plaintiff if it "believed in good faith that a lawsuit might interfere with its attempt to conclude a legitimate sale with the UDC." (Dkt. 858, Tr. 15,525). CMOBC contends that even if the claim were correctly submitted to the jury, there was no evidence to support the jury's finding that Chase Jamaica "wrongfully" refused to aid in the lawsuit. (Interrogatory No. 2). CMOBC points to the "uncontradicted testimony" of Chris Brown, Douglas Judah (counsel for Chase Jamaica) and Moses Matalon (Chairman of the U.D.C. and negotiator for the purchases) to the effect that Matalon did not want to "purchase litigation." This, defendant claims, justified Chase Jamaica's refusal to facilitate the lawsuit. Claiming there is no evidence to support a finding that Chase Jamaica acted in bad faith, CMOBC requests judgment notwithstanding the verdict.

CMOBC ignores, however, the substantial evidence presented by plaintiff from which the jury could and did reasonably conclude that Chase Jamaica wrongfully refused to cooperate in the lawsuit. The record contains testimony by Matalon that the U.D.C. would not have been concerned if the sale were structured so that Rollins could retain control of claims that Rose Hall (H.I.)

had against Holiday Inns. (Dkt. 801, Tr. 4655). In addition, Douglas Judah testified that after Jonathan Golden, an Atlanta lawyer representing Rose Hall, requested Chase Jamaica's assistance in the interference suit, Judah did not ask the government its reaction in this regard. (Dkt. 827, Tr. 9721). In fact, Judah, on behalf of Chase Jamaica, denied Golden's request just two days after it was made. (PX 132). There is also some evidence that the U.D.C.'s counsel, Ian Phillipson, later tried to change the transaction from a share sale to an asset sale (PX 154; PX 157), although CMOBC presented testimony by Matalon that he disapproved of Phillipson's pursuit of the asset sale. (Dkt. 834, Tr. 11,186).

On the basis of this record, there was sufficient evidence to support the jury's finding in Interrogatory No. 2 and neither judgment notwithstanding the verdict nor a new trial is warranted.

4. *Consummation of the Proposed $13 Million Transaction*

The jury was instructed that in order to assess the damages flowing to plaintiff from Chase Jamaica's wrongfully preventing Rose Hall from suing Holiday Inns for interference, it had to first determine the value of the interference claim. (Dkt. 858, Tr. 15,526). The critical element of this value was "whether Rose Hall (H.I.)'s proposed sale for $13 million would otherwise have been consummated." (Dkt. 858, Tr. 15,534).

CMOBC contends that Chase Jamaica's consent to the proposed $13 million transaction was necessary because it held a second mortgage on the hotel and a pledge of the Rose Hall (H.I.) shares. (PX 473(D), (E)). Out of the sale price, plaintiff proposed to pay Chase Jamaica $1,125,000 cash and to secure the balance of the $3,255,000 loan by pledging to Chase Jamaica the $3 million in ten year debentures to be issued by the Jamaican government as part of the purchase price. Al-

though Chase Jamaica agreed to the cash payment, defendant contends that Chase Jamaica refused to accept the debentures as collateral if their term exceeded three years. Since plaintiff was negotiating debentures with a ten-year term, CMOBC argues that Chase Jamaica would not have consented to the debentures in the form proposed. Since the debentures were for an unacceptably long term, CMOBC concludes the jury had no basis for finding that the $13 million transaction would have been consummated.

Plaintiff counters by pointing to abundant evidence in the record supporting the implicit jury finding that Chase Jamaica would have closed the sale notwithstanding its preference for debentures with a shorter term. Brown testified that although Chase Jamaica was not "content about the debentures, . . . [it] hadn't rejected them." (Dkt. 817, Tr. 8027). Plaintiff also introduced several memoranda indicating that Chase Jamaica was urging prompt execution of the agreement of sale. (PX 53; PX 66; PX 524; PX 526; DXC 1082).

The jury had sufficient evidence before it from which to conclude that the $13 million transaction would have been consummated but for the interference. Therefore, judgment notwithstanding the verdict and new trial, if requested, would not be appropriate on this ground.

B. *Motion for New Trial*

1. *Evidentiary Rulings Concerning the Jamaican Cabinet's Approval of the Proposed $13 Million Sale of the Hotel*

Together with Chase Jamaica's consent, discussed *supra* p. 146, Jamaica cabinet approval of the proposed $13 million sale of the Rose Hall Holiday Inn was required. This cabinet approval in the spring or summer of 1976 was a necessary predicate to the jury's finding that the $13 million sale would have been consummated, but for Holiday Inns' interference. (Interrogatory No. 2).

Rose Hall attempted to prove the Jamaican cabinet had approved the deal by proffering the Milner certificate. (PX 726). CMOBC unsuccessfully countered by seeking to admit the Patterson affidavit (Ct.Ex. 60), and the testimony, by deposition or at trial, of Patterson (*id.*), and by seeking to strike the Milner certificate. Judge Steel admitted the Milner certificate in evidence (Dkt. 806, Tr. 5733), refused to admit the Patterson affidavit or testimony (Ct.Ex. 60), and refused to strike the Milner certificate. (Dkt. 747). CMOBC contends that these rulings were erroneous and prejudicial, requiring a new trial.

On November 30, 1982, Rose Hall introduced the certificate of Harold Milner, Deputy Financial Secretary of the Jamaican Ministry of Finance and Planning, which contained information about cabinet approval of the $13 million sale. Judge Steel admitted this certificate (PX 726) under Fed.R.Evid. 803(24) over defendants' objections, stating "[a]ll of the conditions specified in the Rule as a prerequisite to a hearsay exception are satisfied. The duration of the trial, at least another two or three weeks, is sufficient for both defendants to have a fair opportunity to meet the facts which are certified to by Milner." (Dkt. 806, Tr. 5733). Milner certified

> that the acquisition of the Rose Hall Holiday Inn Hotel by National Hotels and Properties Limited [a subsidiary of the U.D.C.] at a cost of U.S. $13 million was approved by the Government on the 26th of April, 1976. The terms of the sale were subsequently modified by the government on the 27th of September, 1976 and accordingly the cost of the stock of Rose Hall H.I. Limited to National Hotels and Properties Limited was U.S. $3.25 million.

(PX 726).

Subsequently, on February 24, 1983, on the eve of close of trial, not two or three weeks after plaintiff introduced the Milner certificate, but rather nearly three months later, CMOBC sought to admit the affidavit of

Percival J. Patterson, Minister of Tourism, Industry and Foreign Trade, and a member of the Jamaican cabinet from 1972 to 1976. Judge Steel denied the admission of this affidavit or, in the alternative of Patterson's deposition or live testimony, stating that it was too late for this type of application. (Ct.Ex. 60). At the time CMOBC made this application, its case had long been completed, as had the case of defendant Holiday Inns and the rebuttal case of plaintiff. Any favorable action by the Court would have mandated the reopening of CMOBC's case, and further opportunity for plaintiff to rebut when all concerned, including the jury, thought the chore of taking evidence was almost completed. Given the totality of circumstances, there was no error in refusing to prolong the longest jury trial ever in the Delaware District. Moreover, the proffered Patterson affidavit did not differ drastically from the Milner certificate which it sought to counter. The Patterson affidavit stated, in pertinent part:

> The Cabinet's approval of the acquisition of the Rose Hall Holiday Inn by National Hotels and Properties Limited for US $13 million ($10 million cash and $3 million notes) in April, 1976 was in principle only, giving me authority as Minister to conclude the agreement subject to certain conditions. These conditions included finding the necessary funds and especially the foreign exchange component.

(Ct.Ex. 60 ¶5). There is nothing in the affidavit stating that the referenced conditions would not be satisfied.

When the Court rejected defendant's proffer of the Patterson affidavit or testimony, CMOBC moved to admit the affidavit of Horace Barber, Governor of the Bank of Jamaica and former Financial Secretary in the Jamaican Ministry of Finance and Planning. Plaintiff did not object, and it was admitted on February 28, 1983. (Dkt. 748, p. 4 ¶13). In the affidavit, Barber certified:

> that the acquisition of the Rose Hall Holiday Inn Hotel by National Hotels and Properties, Ltd. at a cost of US $13 million was approved by the Government on the 26th of April, 1976. The terms of the sale were subsequently modified by the Government on the 27th of September, 1976 and the government approved the purchase from Chase Merchant Bankers Jamaica Ltd. of the stock of Rose Hall (H.I.) Ltd. for US $2.255 million and the purchase of approximately 3,000 acres of land for US $1 million.

(DXC 2099). CMOBC offered this affidavit to correct a mistake in the Milner certificate (PX 726) relating to the purchase price for the Rose Hall (H.I.) stock. In all other respects, the Barber affidavit is virtually identical to plaintiff's exhibit, the Milner certificate.

In introducing this affidavit, CMOBC necessarily waived any objection to the identical evidence contained in the Milner certificate confirming that cabinet approval had been obtained. Although this conclusion appears harsh and unfair at first glance, upon closer examination it becomes evident that CMOBC cannot now object to evidence which is identical to evidence it introduced. Even if the Court were to conclude that the Milner certificate was improperly admitted, this would constitute harmless error under Fed.R.Civ.P. 61 in light of the Barber affidavit which is identical in all material respects.

CMOBC admittedly found itself in a difficult position when the Court correctly refused to admit its proffered Patterson affidavit and testimony. CMOBC felt the need to correct the mistake in Milner's certificate relating to the purchase price. However, plaintiff's counsel, Andrew Kirkpatrick, Esq., represented in a February 26, 1983 letter to Judge Steel: "This dispute is of no consequence to us, and we are willing to agree not to argue or assert for any purpose this particular statement in the Milner certificate. We are willing to formalize this undertaking

in any reasonable way if the Court would find it helpful." It appears certain that CMOBC could have cleared up the error by means other than introducing the Barber affidavit, such as by stipulation or by an affidavit which did not confirm the approval of the cabinet. By making the tactical decision to proceed in the manner in which it did, CMOBC waived any right to object to the Milner certificate. CMOBC is not entitled to a new trial on this ground.

2. *Jury Finding of $4,500,000 in Damages Resulting From Chase Jamaica's Failure to Permit Interference Lawsuit*

By its affirmative answer to Interrogatory No. 2 and its assessment of $4.5 million in damages in Interrogatory No. 6,[56] the jury made several implicit findings of fact which CMOBC contends are contrary to the clear weight of the evidence. As a consequence, CMOBC urges that a new trial be granted. The Court will consider these challenged implicit findings of fact seriatim.

a. *The Jamaican Government Debentures*

The $13 million arrangement which Rollins was negotiating with the U.D.C. for the sale of the hotel was to be payable in $10,000,000 cash and $3,000,000 in long-term Jamaican government guaranteed debentures. By finding damages of $4.5 million (the difference between $13 million and $8.5 million, the actual sale price of the shares including the $6.25 million first mortgage),[57] the jury effectively concluded that the Jamaican government would have issued the proposed $3 million in debentures and that they would have been worth their face value.[58] CMOBC challenges both of

56. *See supra* p. 121.

57. *See supra* note 13.

58. The jury was instructed on this point: "you should determine whether that [$13 million] price should be adjusted upwards,

these findings as against the clear weight of the evidence.

Both Rose Hall and CMOBC presented substantial testimony about the value of the debentures and the likelihood of their issuance. CMOBC presented the testimony of two expert witnesses with excellent qualifications, G. Arthur Brown and Tony Lloyd. The substance of their testimony was that the Jamaican government would not have issued the bonds as proposed, primarily because of their terms providing the holder with a hedge against devaluation and allowing unrestricted transferability. In addition, Lloyd opined that even assuming the government issued the bonds, they would have traded only at a discount from par.

Plaintiff, on the other hand, presented testimony by Rollins, Eugene Weaver, a Rose Hall director and financial officer, Hugh Hart, Rose Hall's Jamaican counsel, and Eric Bell, a Jamaican attorney who held several impressive government posts. These witnesses highlighted the advantages of the proposed debentures which would increase their value, and also opined on the probability of their issuance by the government.

The testimony on the value of the debentures and the likelihood of issuance was conflicting and complex. However, Rose Hall presented substantial evidence from which the jury could have reasonably concluded, by a preponderance of the evidence, that the Jamaican government would have issued the debentures and that they would have been worth their $3 million face value. Therefore, this finding is not against the clear weight of the evidence and does not warrant a new trial.

NOTES *(Continued)*

downwards, or at all by reason of testimony you have heard about the value of the $3 million in proposed debentures which were to be part of that price." (Dkt. 858, Tr. 15,534).

b. *Consummation of the Proposed $13 MillionTransaction*

CMOBC urges that if the Court finds, as it did, that defendant is not entitled to judgment notwithstanding the verdict on the issue that the proposed $13 million transaction would not have been consummated because of Chase Jamaica's "veto power," then CMOBC is entitled to a new trial because the jury's finding was contrary to the clear weight of the evidence. As CMOBC itself notes, plaintiff introduced substantial evidence that the transaction had cabinet approval (PX 726); that it had been announced at a press conference (Dkt. 780, Tr. 477); that drafts of the sale documents had been exchanged with U.D.C.'s lawyers (Dkt. 790, Tr. 2397-2404; PX 630A-F); and that plaintiff expected the deal to close in the summer of 1976 (Dkt. 780, Tr. 443; Dkt. 782, Tr. 869-70). CMOBC contends, however, that the clear weight of the evidence indicated that the sale would not have closed at that price, regardless of Holiday Inns' alleged interference.

As examples of this evidence, CMOBC points to evidence that the government would only acquire the hotel if its revenues supported its operation, which was questionable for the Rose Hall Holiday Inn. In addition, CMOBC again refers to the testimony concerning the debentures which has been treated above. *See supra* pp. 148-149. Again the Court concludes that there was substantial evidence in the record from which the jury reasonably concluded that the $13 million sale would have been closed but for the interference. A new trial is not warranted.

c. *Lawfulness of Holiday Inns' Conduct*

In a conclusory fashion, CMOBC contends that a new trial is required because the jury's finding that Holiday Inns unlawfully interfered with plaintiff's $13 million transaction was contrary to the clear weight of

the evidence. By its affirmative answer to Interrogatory No. 2, the jury necessarily concluded that Holiday Inns' conduct in meetings with Rollins, Golden and Matalon in June and July of 1976 amounted to intimidation, injurious falsehood or both. There was conflicting testimony on this issue presented by Rollins, Golden, Matalon, Brown, Lapwing (an agent of Holiday Inns), Feldman and Rose (executives of Holiday Inns). In addition, the record contains several documents relevant to this matter. *See e.g.*, PX 51, PX 179. The evidence was in conflict, but the jury could have reasonably reached the conclusion that Holiday Inns committed unlawful interference. Consequently, a new trial is not warranted.

3. *New Trial Under Rule 63*

CMOBC claims that since all of the issues composing the question of whether Chase Jamaica wrongfully prevented plaintiff from suing Holiday Inns involved credibility determinations, a successor judge must, under Fed.R.Civ.P. 63, grant a new trial on the matters referenced in Interrogatory No. 2. This is so, argues CMOBC, because a successor judge who did not preside at the trial cannot determine whether the verdict was against the clear weight of the evidence when this would involve assessment of witnesses' credibility.

As noted in the previous sections, the record contains sharply conflicting testimony on each of these issues. The Court has determined, as to each disputed issue, that there is sufficient basis to support the jury's finding. In reaching its conclusions, the jury necessarily made credibility determinations in evaluating the conflicting testimony. The Third Circuit Court of Appeals has stated "since the credibility of witnesses is peculiarly for the jury, it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict." *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 89 (3d Cir.1960), *cert. denied*, 364 U.S.

835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960) (quoting 6 J. Moore, *Moore's Federal Practice* (2d ed.) p. 3819). Although the appellate court was referring to a situation where the presiding trial judge was deciding the new trial motions, there is no reason why this principle should not equally apply to a successor judge. The jury has made the credibility determinations required and has reached conclusions which this Court finds are amply supported by the testimony and documents in the record. When this is the state of the record, there is no more reason for a successor judge to disturb the verdict than for the presiding trial judge. It is only in cases where there is something in the record which causes the successor judge to question whether he would be as able to decide the motion in the same manner as the presiding judge who saw and heard the witnesses that he should grant a new trial under Rule 63. It is not possible to conclude that the jury decided the matter was against the clear weight of the evidence or in a manner which yielded a seriously erroneous result.

The interpretation of Fed.R.Civ.P. 63 urged by CMOBC would require a successor judge to grant a new trial in every instance in which a party claims the verdict is against the clear weight of the evidence and credibility of witnesses is involved. The Court cannot agree with such a reading of a rule which empowers a successor judge to perform the duties required after a verdict is returned and provides as the sole limitation that "if such other judge is satisfied that he cannot perform those duties . . . he may in his discretion grant a new trial." Fed.R.Civ.P. 63.

4. *Jury Instructions on the Interference Claim*

CMOBC contends that since Chase Jamaica had no duty to bring or assign a lawsuit against Holiday Inns, or sell Rose Hall (H.I.) assets instead of shares, the instructions to the contrary (Dkt. 858, Tr. 15,525-26) were

erroneous and prejudicial. The Court has determined that this issue was properly submitted to the jury as part of Chase Jamaica's duty of exercising good faith in the sale of its collateral. *See supra* pp. 144-145. Therefore, the instructions were correct and the jury's findings will not be disturbed.

Additionally, CMOBC urges that a new trial is required because the instructions were incomplete with regard to the underlying torts of intimidation and malicious falsehood alleged against Holiday Inns. In particular, CMOBC objects to the omission of certain of its proposed instructions and the inclusion of plaintiff's allegations. The instructions as given were well balanced and entirely sufficient on the interference claim. (Dkt. 858, Tr. 15,524-34). The instructions included defendant's arguments, opposing plaintiff's allegations, as well as repeated statements that plaintiff had the burden of proving its allegations by a preponderance of the evidence. Therefore, no new trial is warranted.

V. *Liability of Defendant—Cheap Sale*

CMOBC contends that there is no evidence in the record to support the jury's conclusion that Chase Jamaica obtained $1.5 million less than the best available price for the 3000 acres of land at issue. (Interrogatory Nos. 1 and 6(a)). On this basis, CMOBC seeks judgment notwithstanding the verdict or, alternatively, a new trial. The Court will consider CMOBC's various contentions relating to this issue seriatim.

Plaintiff's main evidence as to the damages it suffered on the sale of the land was presented by the testimony of its expert Mr. R.O.P. ("Pat") McDaniel, chairman and managing director of the Jamaican real estate firm, C.D. Alexander & Co. McDaniel gave his opinion on the value of the land in a sale by either a subdivision of part of the land and sale by lots or a sale of the entire 3000 acres as a block. CMOBC argues there is

an insufficiency of proof by attacking McDaniel's testimony as incompetent evidence of the best available price.

A. *Motion for Judgment Notwithstanding the Verdict*

1. *Competency of Evidence of Sale of Land by Lots*

McDaniel testified that if, in September, 1976, he were advising the owner of the 3000 acres of land on how to raise $1 million, the amount for which Chase Jamaica sold the mortgaged Rose Hall land to U.D.C., he would have advised not to sell the whole as a block in the then existing depressed market; rather, he would have suggested subdividing and selling the most saleable land in lots for agricultural and residential use. (Dkt. 802, Tr. 5021-22). If this advice were followed, McDaniel testified that the balance of the land could be developed and sold in the future in accordance with Rollins' land use plan. (PX 252). However, in order to accomplish the subdivision lot sale, McDaniel testified that 18 months to two years would be required. (Dkt. 802, Tr. 5021-22).

a. *Duty to Sell Land by Lots*

CMOBC contends that as a matter of law Chase Jamaica had no duty to subdivide the land and sell it in lots; rather, it had the absolute right to sell the entire collateral, provided it obtained the best available price. In support, defendant cites the Jamaican Registration of Titles Act, section 106,[59] the common law, the mortgage

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59. Section 106 provides, in pertinent part:

If such default in payment, or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgage or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may

instrument (PX 473(D)), and the general policy against requiring subdivision.

After requesting memoranda from the parties (Dkts. 711, 720, 735), Judge Steel formulated the following jury instruction:

> A bank exercising its power of sale may offer the mortgaged property for sale either altogether or in lots, but in determining which method to use, the bank must make that decision in good faith, without reckless disregard for the interests of the mortgagor, and in taking reasonable precautions, for the purpose of obtaining the best available price and avoiding unreasonable sale of excess collateral.

(Dkt. 858, Tr. 15,522-23). This instruction correctly made it the jury's province to decide whether it would have been reasonable for Chase Jamaica to have pursued a lot sale scheme. This Court sees no reason to upset that determination. Therefore, any testimony given by McDaniel relating to a program of subdivision and lot sale went to the issue of Chase Jamaica's good faith in deciding not to pursue such a plan. As such, it was competent evidence.

NOTES *(Continued)*

be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be found to see or inquire whether such default as aforesaid shall have been made or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety of regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.

b. *Timing of Sale*

To further attack McDaniel's testimony which valued the land according to a long term development plan, CMOBC contends that Chase Jamaica had the unqualified right to sell the land on the *date* it chose. On this issue, the jury was instructed as follows:

> When the borrower is in default, the bank, unless it makes an agreement to the contrary, is free to exercise its power of sale for its own purposes whenever it chooses.
>
> Specifically, the bank has no duty to delay the sale to await an improvement in the market; it may choose the time of sale in its own interests, despite the possibility, or even the likelihood, that the market will later improve.
>
> However, in conducting the sale, the bank must take such time and make such arrangements as the circumstances may require, to sell in a way reasonably calculated to obtain the best available price for the collateral. That is, while the bank need not wait for improvement in the market, it must not by unreasonable haste omit to take reasonable precautions to obtain the best available price, but must take such time and make such arrangements as are reasonably necessary, in light of the nature of the collateral and the surrounding circumstances, to obtain the best available price.

(Dkt. 858, Tr. 15,520-21). This instruction was consistent with the earlier findings on mortgagee duties under Jamaican law made by this Court:

> If Rose Hall is suggesting that where there is a complex transaction a mortgagee cannot choose the date when he will exercise his power of sale, I do not agree. On the other hand, if Rose Hall is suggesting that in a situation where a complex agreement of

> sale is worked out by the mortgagee over a period of time, the term "date of sale" should not have reference to one single day, then I agree that the term "date of sale" would not necessarily refer to a single calendar date.

Dkt. 559, p.8 (Magistrate's Sept. 24, 1982 Opinion), *adopted*, Dkt. 631 (Judge Steel's October 7, 1982 Opinion).

Under these controlling principles of Jamaican law, the jury was to consider McDaniel's testimony in deciding what type of sale Chase Jamaica had to conduct in order to fulfill its mortgagee duties. CMOBC's argument that McDaniel's 18-month scheme was unreasonable as opposed to Chase Jamaica's own sale which did not close for 14 months was properly left for jury determination. It is obvious McDaniel's testimony on this point was relevant and competent. At any rate, defendant's argument is an insufficient basis upon which to grant judgment notwithstanding the verdict.

c. *Financing of the Sale*

CMOBC contends that a "fatal defect" in McDaniel's expert opinion was the erroneous assumption that Chase Jamaica would have provided or arranged financing for the sale of lots. This assumption, defendant urges, is contrary to the instruction stating "[a] bank has no duty to provide financing of the sale of collateral." (Dkt. 858, Tr. 15,522). Therefore, CMOBC concludes that McDaniel's testimony was irrelevant and incompetent to support the verdict.

McDaniel testified before the jury about the various assumptions on which his land values were based. He opined that financing was available (Dkt. 802, Tr. 5052-53) and that deposits available to Chase Jamaica would have been generated during the sales period. (Dkt. 802, Tr. 5022). He did not limit the source of financing to Chase Jamaica. The jury was left with the

task of evaluating his testimony in light of the reasonableness of his assumptions. Since the jury placed a total value of $2.5 million on the land, a figure considerably below McDaniel's lot sale valuations, which totaled slightly over $20 million (PX 718A-C; PX 719A-O), it apparently discounted McDaniel's testimony. The Court finds no reason to disturb the verdict on this basis urged by defendant.

d. *Sufficiency of the $1 Million that McDaniel's Plan Would Have Produced*

CMOBC contends that since Chase Jamaica was entitled to receive the entire amount of its debt, $3,255,000, McDaniel's lot sale plan which would have produced $1 million was insufficient to justify the jury's verdict. The short answer to this claim is that the jury could have concluded from all the evidence that Chase Jamaica could have raised the remainder of funds required to pay off its loan through the sale of the hotel, as it in fact did.

e. *Chase Jamaica Being Advised to Subdivide*

CMOBC appears to argue that advice given to Chase Jamaica by its attorneys and real estate appraisers in April and May of 1976 to the effect that it should sell part of the collateral in lots (PX 32, PX 222) would no longer be operative in September of 1976 because of various events in Jamaica during the summer of 1976. CMOBC had a chance to explain or contradict these exhibits at trial, and the jury weighed all the evidence in reaching its conclusion. In light of the relatively low value the jury placed on the land, it is apparent that the jury discounted McDaniel's lot sale valuations to a great extent. There is no reason, however, for the Court to conclude that McDaniel's testimony on lot sales was irrelevant or in-

competent, or, when considered together with other land value evidence presented by plaintiff, insufficient to support the jury verdict.

2. *Competency of Evidence on Sale of Land as a Block*

McDaniel also gave his expert opinion on the value of the 3000 acres of land sold as a block. CMOBC contends that this testimony was also incompetent and irrelevant as a matter of law.

McDaniel testified that the "forced sale" or "ready market" value of the 3000 acres as a block in September 1976 was between $6.1 and $6.6 million.[60] (Dkt. 802, Tr. 5003, 5019-20). CMOBC contends that since McDaniel assumed 18 months would be required to complete the sale (Dkt. 802, Tr. 5017-20), this was not an indication of the best available price for the land in September 1976. The Court has previously treated and dismissed this claim. *See supra* p. 152.

In addition, CMOBC attacks McDaniel's valuation of the land as a block as being based on three assumptions which were no longer valid in September, 1976. The assumptions actually appeared in the 1973 appraisal by C.D. Alexander which placed an $86 million figure on the entire 5500 acres of Rose Hall land.[61] (Dkt. 802, Tr. 4940-70). McDaniel testified that because of the changed circumstances in 1976 which rendered the 1973 appraisal inapplicable, he discounted that valuation considerably to arrive at a $20 million "fair market value," and a $6.1 million to $6.6 million "forced sale value."

60. CMOBC now apparently contends that forced sale value is somehow different from the best available price standard enunciated by this Court. CMOBC did not ask McDaniel if he made such a distinction, and defendant's own land experts testified that the two terms were analogous. (Dkt. 838, Tr. 11,992, Dorchester; Dkt. 830, Tr. 10,279-80, Langford).

61. *See supra* p. 118.

This Court concludes that McDaniel's testimony was competent and relevant evidence on the best available price of the land.

3. *Competency of Other Evidence on Best Available Price of the Land.*

In meeting its burden of proving that Chase Jamaica failed to get the best available price for the collateral, plaintiff introduced evidence tending to show that Matalon made an unsolicited proposal to place a price of $4 million before the cabinet for approval. Matalon wanted the "extra $1 million" to be paid to Rose Hall Ltd. Chase Jamaica, however, rejected this proposal almost immediately. Brown's memo to file recording the meeting with Matalon where this issue arose reads, in pertinent part, as follows:

> The Sale Agreement that he [Matalon] would like to place before the Government would be that they buy the shares in Rose Hall (H.I.) Limited and the land over which we have a first charge for $4 Million. The Extra $1 Million would be paid to Rose Hall Limited. We informed him that this was not acceptable to us . . . . We feel that we should, in any event, write to Urban Development Corp. offering jointly to sell the shares and land for $3 Million. Along with this letter from the Merchant Bank will be an offer to finance from the Chase Manhattan Bank.
>
> For a total of $9.2 Million, without any cash outlay, the Government are acquiring the Holiday Inn (original selling price of the Holiday Inn alone was $14 Million) and 3,500 acres of prime real estate. It is our opinion that this in itself is a very good deal for the Government and we should not include any offer of finance for paying Rose Hall Limited or development cost.

(PX 111).

CMOBC contends that Matalon's offer to place an offer of the extra $1 million before the cabinet is not legally competent evidence of the best available price for the land. One reason for this is that this extra amount would have to have been financed, presumably by Chase Jamaica or Chase Manhattan Bank (Dkt. 817, Tr. 7964-65), and as a mortgagee, Chase Jamaica had no obligation to provide or arrange financing. (Dkt. 858, Tr. 15, 522). However, CMOBC does not dispute that Chase Jamaica never explored the possibility of obtaining the additional financing from the Bank of Nova Scotia or by having the government simply give Rose Hall a note for the additional $1 million thereby making Rose Hall itself the lender. (Dkt. 817, Tr. 7966-84).

Chase Jamaica further attacks this evidence as incompetent by stating that Matalon could not assure Chase Jamaica that the cabinet would approve the higher price. Defendant contends that therefore it would have been too risky and speculative to submit the higher price to the cabinet. This issue, as well as the preceding issue about financing, was presented to the jury. The jury had the task of deciding whether Chase Jamaica acted "in good faith, without reckless disregard for the interests of the mortgagor, taking reasonable precautions to obtain the best available price. . . ." Interrogatory No. 1, *supra* p. 121. All of CMOBC's arguments relevant to this question were presented to the jury, and the jury presumably judged plaintiff's evidence in this light. Simply because CMOBC disputed the feasibility of conducting a sale for $3 million plus the extra $1 million does not mean that this offer by the buyer is not competent evidence of the best available price.

Having held plaintiff's proffer of evidence was competent, relevant and properly admissible over defendant's stated objection, the Court concludes CMOBC is not entitled to judgment notwithstanding the verdict on the cheap sale of the land.

B. *Motion for New Trial*

The Court previously concluded that CMOBC would not be entitled to judgment notwithstanding the verdict on any of the preceding grounds relating to land value. It now undertakes consideration of CMOBC's alternative motions for a new trial on this issue.

1. *The Jury's Answers to Interrogatory Nos. 1(a) and 6(a) as Against the Clear Weight of the Evidence*

CMOBC contends that the clear and indeed "overwhelming" evidence establishes that Chase Jamaica obtained no less than the best available price for the 3000 acres of land. CMOBC produced two land value experts, Cecil C. Langford and John D. Dorchester, whereas plaintiff produced one land value expert, Pat McDaniel. The parties argue at length in their briefs about the superior qualifications of their own experts as contrasted with those of the opposing side's experts. (Dkt. 770, pp. 129-30; Dkt. 868, pp. 156-59). All three of the witnesses were qualified as experts, and neither party challenged this qualification. The degree of difference in training and experience was properly presented to the jury for consideration in the weighing of their opinions.

CMOBC's experts placed the best available price of the land at $975,000 (Dkt. 830, Tr. 10,339, Langford) and $300,000 (DXC 963(3) at 43-44, Dorchester). McDaniel, on the other hand, placed the "forced sale value" at $6.1 to 6.6 million. *See supra* p. 153. CMOBC makes several arguments attacking McDaniel's credibility and courtroom demeanor, and Rose Hall counters by attacking Langford's credibility and testimony. The jury apparently took all of these considerations into account in executing its duty of weighing the evidence and credibility of the witnesses. As a result it placed the best available price of the land at $2.5 million.

The Court finds that this verdict is amply supported by the record and is not against the clear weight of the evidence. In addition to the experts' testimony, the jury was presented with evidence about the "extra $1 million," *see supra* p. 154, and with various contemporaneous documents by Chase Jamaica which set the forced sale value of the land well above the actual sales price of $1 million. These include: a June 22, 1976 memo by Brown stating that "the Government will purchase the entire property [3000 acres excluding the hotel] for approximately $1,800,000." (PX 44); a series of criticized loan[62] reports which set the forced sale value at at least $6 million (PX 14, PX 29, PX 203, PX 208); an October 4, 1976 Credit Audit placing the forced sale value at $6 million (PX 139); and an August 6, 1976 memo by Sigarreta showing his views that the land could be sold for a price in excess of $1.7 to 1.8 million. (PX 76). In addition, Matalon's September 23, 1976 letter to Patterson, the Minister of Industry, Tourism and Foreign Trade, describes the purchase of the Rose Hall (H.I.) shares and the land as the acquisition of "a most valuable asset at an enormous bargain." (PX 133).

In light of this record, the Court concludes that the jury's answers to Interrogatory Nos. 1 and 6(a) were not against the clear weight of the evidence and a new trial is not required.

2. *New Trial on Cheap Sale Under Fed.R.Civ.P. 63*

CMOBC contends that because the issue of the best available price for the 3000 acres of land involves questions of witness credibility, a new trial is automatically required under Rule 63 because a successor judge cannot make credibility determinations. A similar claim re-

62. A criticized loan is one which is classified as being associated with an undue risk, doubtful collection or a loss. (PX 323, §V, pp.1-3). Such loans require special attention by bank officers with the requisite lending authority. *Id.*

lating to Chase Jamaica's refusal to aid in the interference suit was rejected by this Court *supra* p. 150.

In this matter, the jury performed its function of weighing the credibility of the witnesses and concluded that the best available price of the land was $2.5 million, a figure which is lower than that urged by plaintiff, and higher than that urged by defendant. There is nothing in the record which causes one to question the accuracy of the jury's conclusion on this issue. Even if the jury wrongfully credited the testimony of McDaniel whom CMOBC urges it successfully impeached, the record contains abundant evidence in the form of contemporaneous documents supporting the jury's verdict. *See supra* p. 155. CMOBC's new trial motion on this ground will be denied.

3. *Evidentiary Rulings Relating to the Cheap Sale*

CMOBC contends that certain evidentiary rulings were erroneous and a new trial is necessary to rectify these mistakes. As noted, Fed.R.Civ.P. 61 provides that any error in the admission or exclusion of evidence is harmless error and may not justify the grant of a new trial unless the admission or exclusion was "inconsistent with substantial justice." *See Warrick v. Brode*, 428 F.2d 699, 701 (3d Cir. 1970); *Gilmore v. Strescon Industries, Inc.*, 66 F.R.D. 146, 152 (E.D. Pa. 1975), *aff'd*, 521 F.2d 1398 (3d Cir. 1975). CMOBC challenges four evidentiary rulings: first, that plaintiff's evidence of the value of the land was erroneously admitted; second, that evidence regarding a prior criminal conviction of plaintiff's appraiser was erroneously excluded; third, that cross-examination was improperly prohibited regarding the location of the water system; and fourth, that evidence regarding the extent of white sand beach was erroneously excluded. These contentions will be addressed in turn.

a. *Evidence Regarding Land Value*

CMOBC argues that the admission of testimony by plaintiff's expert McDaniel regarding the value of the 3000 acres of land was error. This contention revolves around two premises: first, McDaniel's testimony regarding the sale by lots rather than as a block was irrelevant; and second, McDaniel's testimony was based on dubious and speculative conclusions. CMOBC argues that the introduction of these vastly inflated figures prejudiced the jury. The Court has previously addressed this issue and determined that McDaniel's testimony was competent and relevant. *See supra* p. 154. Therefore, the admission of this testimony was not erroneous and a new trial is not warranted.

b. *Evidence Regarding the Prior Criminal Conviction of a Non-witness Appraiser*

Rose Hall relied upon opinions rendered by Charles V. Ogilvie, a land appraiser, with respect to the value of the 3000 acres.[63] In 1960, Ogilvie had been convicted and sentenced to a three-year prison term on each of four counts of fraud. At the trial, CMOBC was not permitted to introduce evidence regarding this prior conviction. *See* Court Exhibit 59 (also known as TC1059). Ogilvie was not called as a witness but McDaniel relied upon his opinion. (Dkt. 802, Tr. 4920, 4936-37, 4976, 4995).

CMOBC makes several arguments regarding Ogilvie. First, because McDaniel utilized Ogilvie's appraisals as the basis for his testimony, Ogilvie became a de facto witness even though he was not personally in the courtroom. Second, the rule relied upon by Judge Steel

63. Ogilvie performed the 1973 appraisal of the Rose Hall plantation including the 3000 acres, which resulted in an appraisal value in excess of $50 million for the entire 5500 acre plantation. The appraisal itself was excluded as inadmissible hearsay. (Dkt. 802, Tr. 4969-70).

in excluding evidence of the conviction, Fed.R.Evid. 609,[64] applies only to live witnesses and since Ogilvie did not testify, evidence of his conviction should have been admissible under either Fed.R.Evid. 404(b)[65] or 806.[66] Third, the conviction should have been admissible to impeach plaintiff's evidence. Finally, the conviction is

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64. Rule 609 provides in part:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

65. Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

66. Rule 806 provides:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, in-

admissible to rebut Ogilvie's character as a respected appraiser.

These contentions merit, at best, a cursory treatment. The conviction was more than ten years old and thus it comes within the ambit of Fed.R.Evid. 609(b). CMOBC cannot allege that Ogilvie was a de facto witness and then contend that Rule 609 does not apply because he was not a live witness. Finally, the misrepresentation CMOBC conjures up with such zeal relates to a statement that Ogilvie was "actively" engaged in appraisals since 1946. Since he was incarcerated in the 1960's, contends CMOBC, he could not be actively engaged in the business as stated. At best, this misstatement is benign. Finally, just as this Court has rejected CMOBC's contentions regarding McDaniel's testimony of land value, the Court views the failure to admit evidence of Ogilvie's conviction in the same manner. Judge Steel's exclusion of the evidence of the prior conviction is, at most, harmless error. The harmless error aspect is demonstrated where, as here, plaintiff's valuation must be regarded as vastly inflated when compared to the actual jury verdict.

c. *Prohibition of Question on Cross-examination Regarding the Location of the Water System in Relation to the Boundaries of the Property*

At the trial and in its complaint, Rose Hall argued that the value of the 3000 acres was enhanced by approximately $3.5 million because of improvements to the water system. Rose Hall presented Winston Dear, a Jamaican land surveyor, to authenticate the accuracy of

NOTES *(Continued)*

consistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross examination.

a survey of the 3000 acre tract. CMOBC sought to cross-examine Dear regarding the relationship of the water system to the entire 5500 acre tract. This cross-examination was denied on the basis that it exceeded the scope of Dear's direct testimony.[67] CMOBC now argues that this was reversible error because there is doubt that the primary source of water for the 3000 acre tract was within the tract, thereby decreasing its value.

Dear was not asked a single question about any aspect of the water system during his direct examination. Therefore, CMOBC's line of questions was clearly beyond the scope of direct examination. CMOBC properly could have pursued its doubts at other points during the trial. Specifically, CMOBC's expert Dorchester could have testified on direct examination regarding his inspection of the property as compared to Dear's survey. CMOBC could have cross-examined Weitzel on the subject because he testified as to the location of water sources on direct examination. (Dkt. 797, Tr. 3980). Furthermore, CMOBC could have tendered any witness it desired on the subject. Having failed to seize the proper opportunities to pursue this line of inquiry, CMOBC cannot be permitted to cry foul at this late stage. Judge Steel's prohibition of questioning on the issue during cross-examination of Dear was neither improper nor an abuse of discretion.

d. *Evidence Regarding the Extent of White Sand Beach*

The value of the 3000 acres of land was partially contingent upon the extent of beach front property. Of the 2½ miles of sea frontage, Rose Hall claimed most

67. Fed.R.Evid. 611(6) provides:

> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

was white sand beach. CMOBC's expert witness, Langford, testified that only approximately one quarter mile was sand beach and the rest was rocky or swampy and therefore unsuitable for hotel and resort development. (Dkt. 830, Tr. 10,287). CMOBC attempted to allow Langford to testify regarding the genesis of this quarter mile figure as coming from a survey performed by Dear at Langford's request.[68] Langford sought to testify that Dear informed him by telephone as to the extent of sand beach. This testimony was excluded as hearsay.

CMOBC concedes the testimony was hearsay, but argues that it was admissible because an expert may base his opinion on inadmissible evidence. Fed.R.Evid. 703.[69] This contention, however, misses the mark. While an expert witness may base his opinion on such evidence, this does not magically render the hearsay evidence admissible. Langford's expert opinion as to the value of the land was admitted and this was all CMOBC was entitled to. Langford received a surveyor's report from Dear which was not tendered either to Rose Hall or to the Court. As such, the hearsay telephone conversation was not admissible.[70]

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68. Langford apparently paid Dear $400.00 for professional services. Court Ex. 45. This bill was excluded from evidence since it only showed that Dear had performed services rather than the results of those services.

69. Rule 703 provides:

> The facts or dates in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or dates need not be admissible in evidence.

70. Fed.R.Evid. 705 permits inquiry into the facts or opinion underlying an expert's opinion on cross-examination. The rule also permits the court to require disclosure of such facts and dates prior to the rendering of an opinion. Neither Rule 703 nor 705 address the specific question at issue: whether such inadmissible evidence may be brought out on direct examination. Since the Rules do not specifically allow for such admissibility, the Court declines to find

In summary most of CMOBC's contentions regarding the evidence of the value of the land are incorrect. To the extent defendant's contentions are correct, the resultant error cannot constitute prejudicial error. At most some harmless errors were committed which do not justify the grant of a new trial.

4. *Jury Instructions as to the Value of the Land*

CMOBC argues that the jury received erroneous instructions regarding the value of the land. These instructions so prejudiced CMOBC, it is argued, that a new trial must be granted. CMOBC specifically raises four objections to the instructions:[71] first, the instructions failed to advise the jury that fair market value was irrelevant; second, the instructions incorrectly defined best available price; third, the instructions misstated Jamaican law as to the time of sale; and fourth, the instructions failed to adequately explain the significance of Rollins's failure to personally guarantee the loan.

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the exclusion of hearsay was erroneous. *See Bryan v. John Bean Div.*, 566 F.2d 541, 546 (5th Cir. 1978); P. Rothstein, *Federal Rules of Evidence* 289-96 (2d ed. 1979). But *see O'Gee v. Dobb Houses, Inc.*, 570 F.2d 1084 (2d Cir. 1978) (implies admission of such underlying inadmissible facts proper); Fed.R.Evid. 705 advisory committee note ("While the rule allows counsel to make disclosure of the underlying fact or data as preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced."). Even if the exclusion was erroneous, the Court finds the error would not warrant a new trial. *See* Fed. R.Civ.P. 61.

71. CMBOC also alleges that the Court erroneously omitted several instructions as proposed by CMOBC. Arguing that these omissions caused prejudical error, CMOBC refers to its objections to the instructions (Dkt.751) for elucidation. CMOBC's objections cover eleven pages of minutiae which, in the absence of direction from CMOBC, the Court has examined. Judge Steel reviewed these objections and drafted his charge accordingly. The Court perceives no error and therefore omissions in Judge Steel's instructions will not be the basis for the grant of a new trial.

[51] As to fair market value, CMOBC argues that the jury should have been instructed to disregard any argument or evidence regarding long-term fair market value. While the Court seriously doubts the validity of Rose Hall's theory of so-called fair market value, *see infra* p. 175, the plaintiff-favoring standard adopted by the Court permitting such evidence and argument was, at best, harmless error. The jury implicitly rejected Rose Hall's exaggerated claims and novel fair market value theory by returning a damage figure of $1.5 million which was low relative to plaintiff's valuation.

[52] CMOBC argues that "best available price" should have been defined as "the highest price the mortgagee actually could have obtained on the date of sale assuming it acted properly in selling the collateral." *See* Dkt. 631 (Judge Steel's Oct. 7, 1982 Opinion); Dkt. 667 (Judge Steel's Oct. 13, 1982 Order).[72] Any difference between what CMOBC proposes and what the jury actually was instructed is semantic and insignificant.

With regard to the instruction concerning when a mortgagee may exercise its power of sale, CMOBC contends the Court misstated Jamaican law. CMOBC argues that as long as a mortgagee acts in good faith and takes reasonable precautions to obtain the best available price, it may exercise its power of sale at any time.[73] The instruction as given embodies CMOBC's position and accurately paraphrases Jamaican law. *See Bank of Cyprus v. Gill*, [1979] 2 Lloyd's Rep. 508, 511; *Cuckmere Brick Co. v. Mutual Finance, Ltd.*, [1971] 1 Ch. 947; *see also* Dkt. 559, pp. 7-8 (Magistrate's Sept. 24, 1982 Opinion), *adopted*, Dkt. 631 (Judge Steel's Oct. 7, 1982 Opinion).

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72. The jury was instructed that "best available price" means "the highest price that might have been obtained if the bank had acted properly in selling the collateral." (Dkt. 858, Tr. 15,520).

73. For further discussion and the text of the jury instruction, *see supra* p. 152.

Finally, CMOBC argues that the jury should have been instructed that it is presumed Chase Jamaica received the best available price and plaintiff had a duty to mitigate damages by having Rollins personally guarantee the loan so as to cure the default. This Court previously rejected this position, *Id.* at 118-119, and the issue need not be revisited.

In summary, CMOBC's contentions regarding the instructions relating to the value of the land do not warrant the grant of a new trial.

5. *CMOBC's Miscellaneous Grounds for a New Trial.*

In a potpourri of allegations, CMOBC raises other grounds which it asserts warrant the grant of a new trial. These fall within three categories: first, that the Court admitted too much post-September 1976 evidence regarding land value; second, that the Court failed to pose two special interrogatories to the jury; and third, the Court made a plethora of erroneous evidentiary rulings.

[53] As to the first contention, that the Court allowed too much post-September 1976 land value evidence, no error is evident. CMOBC argues that while the Court could permit the introduction of some evidence of post-September 1976 value, it permitted too much. The Court perceives no need to disturb this discretionary decision by Judge Steel. In any event, the error, if any, was harmless.

[54, 55] CMOBC's second contention involves the failure of the Court to include two special interrogatories on CMOBC's affirmative defenses.[74] The first interrogatory related to Rose Hall's ability to prevent the sale of the shares and its choosing not to do so. This relates to Chase Jamaica's willingness to forego its foreclosure remedy if

74. The two interrogatories were presented to Judge Steel by letter dated March 3, 1983 and in one of CMOBC's pretrial submissions. (Dkt. 525, ¶¶ 13, 14). CMOBC objected to the omissions relating to its affirmative defenses. (Dkt. 856, Tr. 15,445-46).

John Rollins were to personally guarantee the loan and cure the default. Rose Hall enjoys a separate status from that of John Rollins. Nonetheless, Judge Steel instructed the jury that Rollins's failure to guarantee the loan, if he were in a position to do so, could be considered in determining the best available price for the land. (Dkt. 858, Tr. 15,523). This obviated the need for a separate interrogatory on this issue. The second interrogatory related to a laches defense. It asked whether Rose Hall unreasonably delayed the filing of this lawsuit so as to unduly prejudice CMOBC's ability to defend itself against these claims.[75] This Court has previously rejected CMOBC's laches defense and this ruling will not be disturbed. 494 F.Supp. at 1158. Any allegation that the witnesses' memories would be unduly dimmed by the passage of time has no bearing in a case timely filed under the applicable statute of limitations.

Finally, CMOBC argues that several evidentiary rulings were erroneous and require a new trial to rectify the resulting prejudice.[76] Some of these contentions are clearly specious—such as that relating to denial of permission to read to the jury newspaper articles that had

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75. At a pretrial conference, the Court stated that CMOBC's laches defense would be presented to the jury. (Dkt. 579 at 70-71). It is unexplained as to why the Court made that ruling in the first instance in light of its prior opinion.

76. The rulings concern: first, the exclusion of Court Ex. 1 (Department of State cable describing conditions in Jamaica); second, exclusion of the deLisser affidavit; third, admission of Nunes affidavit (PX 685); fourth, admission of hindsight testimony on valuation; fifth, admission of the Robinson testimony as an expert legal witness; sixth, exclusion of the Patrikis letter (Court Ex. 38 relating to the Edge Act); seventh, exclusion of CMOBC's expert's report regarding valuation; eighth, denial of right to read hundreds of previously admitted newspaper articles to the jury; ninth, restriction of cross-examination of plaintiff's witness regarding replacement costs; tenth, refusal to give curative instructions that two slides showed beach that was not part of the 3000 acres; eleventh, exclusion of approximately eleven CMOBC exhibits; and twelfth, admission of two of plaintiff's exhibits.

been admitted on the condition they would not be read. None of the alleged errors, taken individually or collectively, affect substantial rights as to warrant a new trial.

Pursuant to Fed.R.Civ.P. 61 and Fed.R. Evid. 103(a), none of CMOBC's contentions separately or collectively transcends the level of harmless error. As such, a new trial is not warranted and CMOBC's motion for new trial will be denied.

VI. *Rose Hall's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial.*

Having considered all of CMOBC's motions and granted the motion for judgment notwithstanding the verdict on the only issue upon which the jury found CMOBC liable—the fraud issue—the Court now turns to those issues raised by Rose Hall in its post-trial motion. Rose Hall argues that CMOBC "controlled" Chase Jamaica's action with regard to the allegedly "cheap" sale of the collateral and the loss of the so-called interference claim against Holiday Inns.[77] This section of the opinion will consider three distinct aspects of Rose Hall's arguments: first, that CMOBC's liability for Chase Jamaica's actions is established as a matter of law by certain provisions of the Edge Act, 12 U.S.C. §611-632, which mandate control; second, that under the Edge Act, CMOBC is presumed to have controlled Chase Jamaica and this presumption was not rebutted; and third, that independent of the Edge Act, sufficient evidence was adduced to establish that CMOBC controlled Chase Jamaica's actions. Rose Hall raises two conditional arguments regarding issues that should be considered in any grant of a new trial. These arguments will be discussed in the final portion of this section.

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77. Interrogatory Nos. 1, 2, 3, *supra* p. 118.

A. *Control as a Matter of Law: Rose Hall's Edge Act Theory*

In 1919, Congress amended the Federal Reserve Act to allow national banks to establish subsidiaries to engage in international banking and finance. These subsidiaries were to be federally chartered and became known as "Edge Act corporations," named after the drafter and proponent of the legislation, Senator Walter Edge. CMOBC, a wholly owned subsidiary of Chase Manhattan Bank, N.A., is a federally chartered Edge Act corporation and has designated Newark, Delaware as its home office.[78]

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78. It is important to put Edge Act corporations into the proper historical perspective. Prior to 1913, American banks generally were prohibited from engaging in activities outside the United States. In 1913, Congress enacted the National Banking Act which amended section 25 of the Federal Reserve Act. Act of Dec. 23, 1913, §25, 38 Stat. 251, 273 (1913), 12 U.S.C. §§601-604. The legislation granted national banks the power to establish foreign branches, to engage in certain transactions arising out of foreign trade, and to act as fiscal agents of the United States, if required. In 1916, the National Banking Act was amended to authorize national banks to invest in the stock of a bank or corporation chartered under either federal or state law and "principally engaged in international or foreign banking . . . either directly or indirectly through the agency, ownership, or control of local institutions in foreign countries." Act of Sept. 7 1916, 36 Stat. 752, 755-56 (1916), 12 U.S.C. §601. These corporations could be formed only under state law and approval of the Federal Reserve Board of Governors was required for national banks to acquire stock in these state-chartered corporations. As such these became known as "agreement corporations."

Few agreement corporations were formed and, in an effort to stimulate and facilitate trade with Europe after the First World War, Congress temporarily amended the Federal Reserve Act by adding section 25a to provide for investment in either banking or financing operations. Act of September 17, 1919, 41 Stat. 285-86 (1919), 12 U.S.C. §601. Later in 1919, Congress promulgated the Edge Act which granted permanent authority to national banks to participate in banking or financing corporations. The Edge Act brought these financing and banking corporations under more direct supervison of the Federal Reserve Board of Governors by authorizing their in-

Under the terms of the statute, Edge Act corporations may directly engage in foreign banking or finance operations or they may establish foreign branches, agencies or subsidiaries to carry on such business. 12 U.S.C. §615. In effect, Edge Act corporations may become a type of holding company for entities engaging in international and foreign banking. Chase Jamaica, a wholly owned subsidiary organized under Jamaican law, is such an entity.[79]

Rose Hall focuses upon three provisions of the Edge Act to argue that CMBOC, as a matter of law, controlled the actions of Chase Jamaica. As such, Rose Hall asserts that it need not establish the predicates for conventional disregard of corporate entities as between Chase Jamaica

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corporation under federal charter.

Under these two legislative schemes—the National Banking Act and the Edge Act—two types of corporations have evolved: first, state chartered agreement corporations; and second, federally chartered Edge Act corporations.

For a further discussion of the Edge Act and its interplay with the National Banking Act, see J. Baker & M. Bradford, *American Banks Abroad: Edge Act Companies and Multinational Banking* (1974); Cobb, *A Shot in the Arm for Edge Act Corporations*, 97 Bank.L.J. 236 (1979); Kelly, *Edge Act Corporations After the International Banking Act and New Regulation K: Implications for Foreign and Regional or Smaller Banks*, 20 Va.J.Int'l L. 37 (1979); McGuire, *The Edge Act: Its Place in the Evolution of International Banking in the United States*, 3 Law. of the Am. 427 (1971); *Note: A Constitutional and Statutory Analysis of State Taxation of Edge Act Corporate Branches*, 51 Ford.L.R. 991 (1983); Wiley, *Edge Act Corporations—Catalysts for International Trade and Investment*, 16 Bus.Law. 1014 (1961).

79. CMOBC conducts international business through various entities including subsidiaries, affiliates, and branches. Branches are offices of the Edge Act corporation located outside the United States, whereas affiliates are direct or indirect subsidiaries in which the Edge Act corporation has less than a controlling interest. 12 C.F.R. §211.3(a) & (g). Similarly, subsidiaries are organizations which are more than 50 percent owned by the Edge Act corporation or "otherwise capable of being controlled by the investor or an affiliate of the investor." *Id.*, at §211.3(p).

and CMBOC because the statute has already done so. First, section 611 provides that corporations may "be organized for the purpose of engaging in international banking or foreign banking . . . , either directly or through the agency, ownership or *control* of local institutions in foreign countries." 12 U.S.C. §611 (emphasis added).

Second, section 615 allows an Edge Act corporation, with the consent of the Federal Reserve Board of Governors, to: first, "establish and maintain for the transaction of its business branches in foreign countries," 12 U.S.C. §615(b); and, second, to purchase and hold stock . . . in any corporation organized under the [Edge Act] or under the laws of any foreign country. 12 U.S.C. §615(c). Chase Jamaica is such a local institution within the purview of section 615(c). Thus, an Edge Act corporation need not utilize an instrumentality to engage in foreign banking; rather, it may also directly engage in such transactions. *See* 12 U.S.C. §§611, 615(a).

Finally, the jurisdictional section of the Edge Act, which was added in 1933, provides:

> [A]ll suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking . . . either directly or through the agency, ownership, or control of branches or local institutions . . . in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits.

12 U.S.C. §632.

Judge Steel, in ruling on CMBOC's motion for summary judgment, stated by way of dicta that if the Edge Act corporation established a foreign branch or agency, it would be liable for the actions of either entity. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*,

494 F.Supp. 1139, 1154 (D.Del.1980). CMBOC apparently concurred with this conclusion. *Id.* at 1154 n. 19. The opinion went on to address the question of Edge Act corporation liability for actions of subsidiaries and stated: "If an Edge Act corporation should do business in a foreign country through the acquisition of stock in a 'local institution' control of the Edge Act corporation over the local institution is a mandated prerequisite to its organization." *Id.* at 1154-55. Rose Hall misconstrues this statement by characterizing it as a holding that the Edge Act, as a matter of law, renders the Edge Act corporation liable for its subsidiary's actions under all circumstances. In actuality, the Court deferred a holding on this question and was simply establishing the predicate for the holding addressed in the next section of its opinion: that the Edge Act erects a presumption of control by the Edge Act parent of major actions taken by the subsidiary. *See infra* pp. 166-169.

Despite an exhaustive search through the legislative histories of the various parcels of legislation making up the Edge Act and the National Banking Act,[80] a review of the handful of cases which even mentions the Edge Act, and a search for analogous statutory schemes, the Court has failed to uncover a kernel of support for plaintiff's

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80. The language "directly or through the agency ownership or control of local institutions in foreign countries" which appears in sections 611 and 632 of the Edge Act had its genesis in the 1916 amendment to the National Banking Act. *See supra* note 78. Under the National Banking Act, courts have held that a parent bank is not liable for the actions of its branches because the deposits of branches must be kept separate from those of the parent pursuant to statute. *Pan American Bank & Trust Co. v. National City Bank*, 6 F.2d 762 (2d Cir.1925), *cert. denied*, 269 U.S. 554, 46 S.Ct. 18, 70 L.Ed. 408 (1925); *In re Harris*, 27 F.Supp. 480 (S.D.N.Y.1939). Judge Steel considered these cases inapplicable for two reasons: first, the National Banking Act contains specific statutory provisions which are not duplicated in the Edge Act; and second, neither case involved the issue of whether the parent bank was required to control its wholly owned foreign subsidiaries.

novel theory. In its exhaustive briefing of this issue, the plaintiff basically relies on four arguments to support its theory: first, the aforementioned statutory language; second, a prophylactic statement that "[e]arlier in this case we made a complete study of the legislative history of relevant sections of the Federal Reserve Act governing international and foreign banking (including, most importantly, the Edge Act), and satisfied ourselves that what legislative history there is supports our construction of the statute and particularly 12 U.S.C. §632,"[81] third, a refutation of CMBOC's citations to the legislative history; and fourth, a generalized argument based upon perceived policies of the Edge Act. These arguments will be treated in reverse order.

Rose Hall argues that the Edge Act must mandate control because the United States has a strong interest in ensuring that foreign subsidiaries of Edge Act corporations engage in proper banking procedures in order to maintain the reputation of American banks abroad. Despite this laudatory goal, neither the statute, the legislative history, nor the structure of the international banking system supports plaintiff's position. Banking regulation is more pervasive in the United States than in most other countries. *See* Carswell, *Influence of International Banking on Bank Regulations in the United States*, 3 J. of Comp.Corp. L. & Sec.Reg. 363 (1981). Exportation of United States law and regulation to foreign subsidiaries could place those subsidiaries at a competitive disadvantage. Such an effect would directly contravene the purposes of the Edge Act.[82] Additionally, Congress expressly

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81. Letter from Paul P. Welsh, Esq. to Hon. Murray M. Schwartz, July 11, 1983, p. 1.

82. In 1978, Congress promulgated the International Banking Act of 1978 which, in part, amended the Edge Act and added that the congressional purpose of the Edge Act is "to provide for the establishment of international banking and financial corporations operating under federal supervision with powers sufficiently broad to enable them to compete effectively with similar foreign owned

disavowed attempts to export United States law to foreign subsidiaries. During hearings on the bill, Federal Reserve Governor William P. G. Harding, in addressing whether Edge Act corporations should be permitted to receive deposits in the United States, noted:

> What they can do in foreign countries, of course, depends upon the laws or regulations of foreign countries. A foreign country may impose some limitations upon them which would make it unprofitable to receive deposits there, but I think we ought to have them on the same footing as every other foreign corporation with which they come in competiton.

Amendment to Federal Reserve Act: Hearing Before the Committees on Banking and Currency of the House of Representatives on S. 2472, 66th Cong., 1st Sess. 21 (1919) [hereinafter *House Hearings*]. Plaintiff argues that this statement should be confined to the ability to receive foreign deposits and portends nothing more. (Letter from Paul P. Welsh, Esq. to Hon. Murray M. Schwartz, July 11, 1983, pp. 2-3). Whether the local regulation noted above relates to deposits or any other aspect of banking regulation, Congress clearly intended that local regulation would govern the actions of Edge Act corporations and their subsidiaries abroad.

Rose Hall also argues that the United States has a strong interest in ensuring proper banking operations when either Edge Act corporations or foreign subsidiaries operate in nations where regulation is lax. Such an argument in favor of the export of United States law represents not only a form of legal imperialism but also embodies the essence of sanctimonious chauvinism. In effect, plaintiff argues "we must regulate for the world because the world is too weak to do what is necessary." While admittedly some host countries do not take their regulatory responsibilities seriously, the correct answer

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institutions in the United States and abroad." 12 U.S.C. §611a.

to such a situation is not the extraterritorial application of United States law but rather cooperation between home and host country regulatory authorities. As one commentator has recently suggested:

> A few years ago it was quite normal to think that the authority which supervised a parent bank was entirely responsible for supervising all its direct activities abroad—lending directly abroad, and so on. To a certain extent, it also supervised foreign branches, although there were some exceptions, because branches were already being supervised in the host countries. It was admitted, however, that subsidiaries were the concern of the local authorities only, and not the concern of the parent.
>
> It is only a relatively recent development to admit—and quite rightly, of course—that economically a subsidiary is very similar to a branch. It has not made sense for the parent's authority to supervise a branch and to forget about the subsidiary.
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> * * * * * *
>
> Surely, the principle of supervision of these entities by the parent's authority is not universally acknowledged today. In some countries there is still a lack of legal basis for consolidated worldwide supervision by its parent['s authority] . . . . But in more and more countries, the legal basis exists and the will of the supervisory body is also present.
>
> There are, of course, technical difficulties in supervising foreign operations.
>
> The host country also provides supervision — local supervision — for the branch or subsidiary. Certainly, the aim is not just to have additional competitive, and excessive supervision of the same banking operation. Rather, the idea is to develop rational cooperation between two institutions to verify the conditions of their subsidiaries. I think

> that submission to the supervisory authority of the parent country is necessary in order to have an overall view of the whole banking group. Being able to see it in a comprehensive form, the parent [authority] can apply at least some control to the whole of the banking group.

Hirsch, *Supervising Multinational Banking Organizations: Responsibilities of the Home Country*, 3 J. of Comp.Corp.L. & Sec.Reg.238, 240 (1983). It should be noted that while subsidiaries and branches may be economically very similar, they already enjoy a separate legal status that forms the foundation of corporate law.

Regulation, however, is entirely distinct from parental control, as a matter of law, of a subsidiary's actions. In fact, Regulation K of the Federal Reserve Board, which applies to Edge Act corporations, provides for supervision by the Edge Act corporation of foreign branches and subsidiaries to ensure conformity with "high standards of banking and financial prudence." 12 C.F.R. §211.7(a).[83] Such supervision, however, is not tantamount to control. It simply serves an informational and regulatory purpose to ensure the financial health of the Edge Act corporation.

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83. The relevant portion of the regulation reads:

> (a) *Supervision*. (1) Investors shall supervise and administer their foreign branches and subsidiaries in such a manner as to ensure that their operations conform to high standards of banking and financial prudence. Effective systems of records, controls, and reports shall be maintained to keep management informed of their activities and condition. Such systems should provide, in particular, information on risk assets, liquidity management, and operations of controls and conformance to management policies. Reports on risk assets should be sufficient to permit an appraisal of credit quality and assessment of exposure to loss, and for this purpose provide provide [sic] full information on the condition of material borrowers. Reports on the operations of controls should include the internal and external audits of the branch or subsidiary.

12 C.F.R. §211.7(a).

Rose Hall has failed to adduce one iota of legislative history in support of its assertion that the Edge Act mandates control over *all* actions of foreign subsidiaries, thereby establishing the responsibility of CMOBC for the actions of Chase Jamaica. CMOBC has been placed in the difficult position of demonstrating a negative—that the Edge Act does not mandate control. In support of its difficult task of demonstrating an unarticulated negative congressional purpose, CMOBC has cited several passages of the legislative history. Plaintiff has been content to level salvos against these legislative constructions as if it did not have the burden of conclusively establishing some rational basis for its novel theory. On the whole, the legislative history is unhelpful. In addition to the statement by Governor Harding, *supra* p. 163, there are few instances where branches and subsidiaries are even mentioned.[84] The totality of the legislative history re-

84. The following constitute some of the salient points in the legislative history. Rep. Platt stated during the debate on the Edge Act:

> The Federal Reserve Act, in section 25, first gave our national banks a chance to compete with something approaching equal terms by providing that banks with a capital and surplus of a million dollars or more might establish foreign branches. When a bank establishes a branch, however, it risks all of its capital in that branch—the branch is part of itself—and very few banks felt strong enough to do this.

Congressional Record, House 7855 (Nov. 1, 1919). Plaintiff argues that this simply reflects an intent to insulate the parent bank, here Chase Manhattan Bank, N.A., from liability of its Edge Act subsidiary's, here CMOBC's, actions and does not reflect an intent to protect the Edge Act corporation from the actions of its subsidiaries. This position could well be correct, but does not advance the inquiry before the Court.

During the Hearings on the Edge Act the following colloquies occurred:

> Mr. Wingo. I notice that you provide that these corporations shall engage in these banking or other financial operations either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular provisions as provided by this section. Is it your idea

flects a concern that the acquired or formed "local institutions" be engaged in banking rather than some commercial operations that would compete with domestic concerns. Similarly, Congress recognized and sought to preserve the fundamental legal distinction between branches and wholly owned subsidiaries that, in the former case, the entity is part of the parent bank while the latter reflects separate and distinct corporate entities even though the subsidiary may be controlled through stock ownership and thereby voting power. The legislative history fails to provide any indication that subsidi-

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that the local institution will be limited to banking institutions, or would they include—

Mr. Harding. No, limited to banking institutions.

Mr. Wingo. Do you catch what I mean, that we could either make a foreign bank our agency, or we could control it through a majority of its stock, or we could own it outright? Would it be a banking institution over there, or a commercial institution?

Mr. Harding. Let me explain that to you. Some banks have established their own branches in foreign countries where they own the whole thing. Under their charter they can establish branches in foreign countries, as they have done in Venezuela, for instance, and the United States of Columbia. They could establish a bank at Bogata, or Caracas, and that bank will be a separate, local organization; it will not be a branch. It will be a subsidiary rather than a branch having its own capital stock, and the parent bank will own a controlling interest in that bank.

House Hearings, supra p. 163, at 38. Similarly:

Mr. Phelan. Permission apparently is given there to these corporations to hold stock in other similar corporations. Is that correct?

Mr. Strauss. Yes.

Mr. Phelan. What is the purpose of that?

Mr. Strauss. In many cases it may be necessary for them to organize local corporations in other countries. Some of our banks operating in foreign countries now found it expedient to organize separate banks, one in Peru, one in Nicaragua, the parent bank in this country acting as a holding company in respect to the shares of the bank in that particular country. They want local directors; they want to make the institution, as far as possible, take on a local color.

Id. at 64.

aries of Edge Act corporations should be treated any differently than subsidiaries of any other corporation. As such, there is no indication that Congress intended to, in effect, automatically disregard the corporate status of Edge Act corporations and their foreign subsidiaries. Rather, by recognizing the possibility of establishing foreign subsidiaries, Congress implicity recognized the attendant legal distinction between parent and subsidiary.

Having dispelled the majority of plaintiff's arguments, only the language of the statute remains. The arguments as to each of the three statutory provisions are easily dispelled. First, section 611, with its "directly or through the agency ownership or control of local institutions in foreign countries" language, simply reflects the aforementioned recognition of the subsidiary as an independent corporate entity subject to its parent's control through ownership. It does not render the subsidiary part of the parent in the same manner as a branch. Second, section 615(c) which recognizes the power to purchase the stock of foreign corporations, simply allows the Edge Act corporation to establish subsidiaries—it does not remove the legal distinction between the corporate entities.[85] Finally, section 632, *see supra* p. 162, is simply a jurisdictional provision; it does not, by its own terms, disregard the separate corporate status of CMOBC and Chase Jamaica. Only if the circumstances justify ignoring corporate entities, a subject addressed *infra*, can liability be imposed. Section 632

85. CMBOC argues that section 615(c) limits equity participation in such a foreign corporation to ten percent of the Edge Act corporation's capital and surplus (fifteen percent if the foreign corporation is engaged in banking as opposed to financing) and thus exhibits an intent to limit the Edge Act parent's liability. Since the Edge Act corporation could own one hundred percent of the foreign subsidiary as long as the investment did not exceed the ten or fifteen percent maximum of its own capital and surplus, no such intent is evident. Section 615(c) seeks only to diversify risks, not limit liability.

simply provides Rose Hall a forum to determine if the circumstances warrant a finding of whether the separate corporate status of CMOBC and Chase Jamaica should be disregarded.

[58] In summary, the Edge Act does not impose liability on CMOBC for Chase Jamaica's actions as a matter of law. The structure of the Edge Act allows Edge Act corporations to transact business through foreign subsidiaries—a prerogative exercised by CMOBC. The Court now turns to the factual question of whether CMOBC did, in fact, control Chase Jamaica's actions with respect to the sale of the land and the loss of the interference claim.

B. *The Presumption of Control Under the Edge Act*

In denying CMOBC's motion for summary judgment which alleged the unavailability of a cause of action against CMOBC based upon the Edge Act, Judge Steel found that the Edge Act erected a presumption of control by CMOBC of major actions taken by Chase Jamaica. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F.Supp. at 1155. Further, the Court found that the loan to Rose Hall and subsequent foreclosure and sale could constitute major actions that would be subject to the control of CMOBC. *Id.* Rose Hall argues in its motion for judgment notwithstanding the verdict, or, in the alternative, for new trial, that: first, the presumption cannot be rebutted because it is conclusively established; and second, that CMOBC failed to rebut this presumption of control, *i.e.*, there was a failure of proof to support the jury's finding in answer to Interrogatory No. 3, [86] that CMOBC did not control either the sale of the land or the loss of the interference claim pursuant to the Edge Act theory. On its part, CMOBC tenders several arguments: first, that Judge Steel's opinion was incorrect because the Edge Act presumes only

86. *See supra* p. 121.

voting control of subsidiaries; second, that Judge Steel's instructions to the jury were erroneous on this question; and third, that no evidence supports overturning the jury's determination of no control.

Judge Steel did not adopt plaintiff's argument that the Edge Act erects an irrebuttable presumption of mandated control;[87] instead he found that the Edge Act erects a rebuttable presumption of mandated control. Since the jury found no control, the Court need not address the correctness of Judge Steel's ruling unless the Court concludes that a reasonable jury could not have found that the presumption had been rebutted on the basis of the evidence presented at the trial.[88] With

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87. This Court has also rejected this argument. *See supra* pp. 161-166.

88. As has been previously noted, this Court, sitting as a successor judge, may review the rulings of Judge Steel and reverse those rulings if erroneous and material. *See supra* pp. 125-126. Judge Steel found that the Edge Act mandated control of foreign subsidiaries in major policy decisions and actions. Thus, reasoned Judge Steel, the Edge Act corporation, CMOBC, was legally required to control the major actions of the foreign subsidiary, Chase Jamaica. 494 F.Supp. at 1154-56. Judge Steel recognized that his ruling might have to be revisited. (Dkt. 819, Tr. 8372, 8383, 8387-88). It is perhaps helpful to view the issue of control under the Edge Act as a continuum with plaintiff's irrebuttable presumption of mandated control and CMOBC's contention of ordinary voting control at opposite ends. Given the supervision requirements of Regulation K, promulgated under the Edge Act, which impose supervision requirements greater than those imposed by ordinary voting control, CMOBC's position would appear untenable. Both Judge Steel and this Court have rejected Rose Hall's equally extreme position. Nonetheless, at least three alternative positions along the continuum are evident. One position is embodied in Judge Steel's construction that the Edge Act legally requires control of major actions. The presumption that the Edge Act corporation complied with this legal requirement may be rebutted if the action was merely within the normal day-to-day operation of the subsidiary and therefore outside the realm of major decisions of policy and actions taken to implement them or that the Edge Act corporation violated the law. Since the transactions at issue here are undoubtedly "major ac-

regard to plaintiff's new trial motion, the Court must determine if the verdict was against the clear weight of the evidence, even if judgment notwithstanding the verdict could not be entered. *See supra* pp. 124-125.

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tions," the jury effectively found that CMOBC violated the Edge Act by not exercising the mandated control. A second construction raises a presumption that the Edge Act corporation controlled the major actions of its subsidiary but is not legally obligated to do so. A third position is that under Regulation K the Edge Act corporation is only required to supervise its subsidiaries and that a plaintiff may prove, without the benefit of a presumption, that the Edge Act corporation in fact controlled the specific actions of its subsidiary. Obviously, the first construction imposes a more onerous burden upon the defendant than either the second or third. In this sense, Judge Steel utilized a plaintiff-favoring interpretation of the Edge Act and, despite this, the jury found that CMOBC did not control the actions of Chase Jamaica. In light of the jury's verdict, the Court need not decide which, if any, of the various positions along the continuum of control is the proper interpretation of the statute because the interpretation, even if erroneous, is not material. Nonetheless, Congress has specifically devised statutory schemes embracing the second interpretation which raises a rebuttable presumption of control. The anti-boycott provisions of the Export Administration Act provide explicitly for such a presumption. *See* 50 U.S.C. §2407 (prohibits U.S. persons from complying with restrictive trade boycotts); 50 U.S.C. §2415 (U.S. person defined as including "any foreign subsidiary or affiliate . . . of any domestic concern which is controlled in fact by such domestic concern as determined under regulation of the President."); 15 C.F.R. § 369.1(c) (defines "controlled in fact" as presumed, subject to rebuttal, when parent owns more than 50 percent of the securities, or a lesser percentage if the same constitutes de facto control, or otherwise controls the day-to-day operations of the subsidiary); *see also* 15 U.S.C. §78g(f)(2)(C) (foreign persons controlled by U.S. person for purposes of margin requirements includes subsidiaries where the parent holds more than fifty percent of the voting shares). The Edge Act, albeit drafted at an earlier time, does not expressly provide for such a presumption. Regulation K avoids any requirement other than that of supervision. As such, it is arguable the most appropriate interpretation would appear to be the third interpretation—that the Edge Act requires the Edge Act corporation to supervise its foreign subsidiaries but that a plaintiff bears the burden of demonstrating that control of specific actions actually occurred.

Rose Hall's principal argument is that control under the Edge Act is conclusively presumed and CMOBC may not rebut the presumption because it may not argue that it, in effect, violated the Edge Act by failing to control Chase Jamaica.[89] Plaintiff's attempt to erect a Catch-22 situation where CMOBC must argue that it violated the Edge Act in order to rebut the presumption and that it is estopped from so arguing, suffers from two flaws: first, plaintiff's argument effectively transforms the rebuttable presumption into an irrebuttable presumption;[90] and second, there is no rational basis for estopping CMOBC from making this argument.[91]

This construction is analogous to the issue of control independent of the Edge Act discussed *infra*.

89. Judge Steel gave the following instruction to the jury on this point:

> CMOBC is a federally chartered banking corporation, of a type called an "Edge Act Corporation." It has the power to engage in international or foreign banking or financial operations directly or through the agency, ownership or control of local institutions in foreign countries.
>
> When an Edge Act Corporation like CMOBC does business in a foreign country through ownership in a local institution such as Chase Jamaica, control of the Edge Act Corporation over the local institution is mandated by federal law. This control extends to major policy decisions and actions.
>
> If you find from the evidence that Chase Jamaica's sale of the Rose Hall land and the Rose Hall (H.I.) shares was made pursuant to such a major policy decision, then it is presumed that such decision was controlled by CMOBC. Although the presumption is not evidence, it shifts the burden of proof so that, as to this issue, CMOBC has the burden of showing by a preponderance of the evidence that Chase Jamaica acted independently with respect to such decision.

Dkt. 858, Tr. 15,537-38.

90. Such a transformation directly contravenes this Court's rejection of the theory that the Edge Act imposes control as a matter of law. *See supra* pp. 161-166; *See also* 494 F.Supp. at 1155.

91. Plaintiff cites several cases concerning this estoppel argument which basically represent an exposition of the equitable doctrine of "clean hands." These cases, however, are inapposite because it is Rose Hall, not CMOBC, that has invoked the equitable

Rose Hall also appears to argue that it adduced sufficient evidence at trial to support a finding of control,[92] based solely upon "CMOBC's binding admissions, in its own documents and the testimony of its directors and other witnesses." (Dkt. 771, p. 14). As such, under any construction of Fed.R.Civ.P. 63, a new trial is not mandated because weighing of credibility is not involved. Rather, this Court need only assess the evidence to determine if either judgment notwithstanding the verdict or a new trial should be granted. Moreover, even if the credibility of witnesses were involved, it would not require automatic grant of a new trial. *See supra* p. 125.

CMOBC presented overwhelming and uncontradicted evidence that it exercised no control over the administration or collection of the Rose Hall loan and that it did not participate in any fashion in the Jamaican action.[93] In the face of this evidence, Rose Hall relies solely upon two Chase Manhattan Bank, N.A. manuals—the Credit Policy Guide (PX-323) and the Organization & Policy Guide (PX-324)—to support the presumption that CMOBC, or some other Chase entity, controlled the actions of Chase Jamaica.[94] Rose Hall submitted a de-

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powers of this Court.

92. As plaintiff apparently concedes, the evidence must be viewed in the light most favorable to the non-moving party in disposing of motions for a new trial or judgment notwithstanding the verdict. (Dkt. 772, p. 1, ¶3); *see also Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir.1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977).

93. *See* Dkt. 809, Tr. 6460-61, 6560, 6573-74 (Giberga testimony); Dkt. 811, Tr. 6818-19, 6871 (Brown testimony); Dkt. 813, Tr. 7236, 7293, 7315, 7343-44 (Brown testimony); Dkt. 819, Tr. 8364-65 (Leonard testimony); Dkt. 821, Tr. 8654 (Judah testimony); Dkt. 823, Tr. 9037 (Hill testimony); Dkt. 834, Tr. 11,220, 11,223 (Sigarreta testimony); Dkt. 836, Tr. 11,524-27 (Mason testimony).

94. Rose Hall relies upon the testimony of Francis X. Stankard, CMOBC's Chief Executive Officer, for the point that all Chase subsidiaries, including Chase Jamaica, were expected to act in accordance with the manuals. (Dkt. 834, Tr. 11,125-26). Mr.

tailed fourteen-page single-spaced memorandum describing the various portions of the Manuals dealing with control of subsidiary operations. *See* Letter from Paul P. Welsh, Esq. to Hon. Edwin D. Steel, Jr. (Nov. 30, 1982) (attached as Appendix B to Dkt. 772).[95] These manuals simply reinforce and reflect compliance with Regulation K.[96] *See* Dkt. 795, Tr. 3359 (Leonard testifying that manuals used to comply with Regulation K). The manuals do not, in and of themselves, support a finding that CMOBC controlled the particular actions at issue. The jury found that CMOBC effectively rebutted the presumption of control and *no* evidence contradicts CMOBC's evidence that it did not control Chase Jamaica's specific actions. Consequently, neither plaintiff's motion for judgment notwithstanding the verdict nor for a new trial will be granted on this ground.

C. *Control Independent of the Edge Act*

As noted, in Interrogatory No. 3 the jury was asked to determine whether CMOBC controlled Chase Jamaica's major decisions and acts relating to the sale of the Rose Hall land and shares and the loss of the alleged interference claim. Control could be premised either

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Stankard also testified, however, that these manuals were only general policy statements and were neither intended nor sufficient to govern day-to-day operations. (Dkt. 834, Tr. 11,166).

95. CMOBC objected to the admission of the manuals as irrelevant pursuant to Fed.R.Evid. 401, 402. *See* Letter from Charles S. Crompton, Jr., Esq. to Hon. Edwin D. Steel, Jr. (Nov. 15, 1982). Plaintiff's November 30 letter responded to these relevancy objections and Judge Steel admitted the manuals.

96. Section 211.7(a) of Regulation K, *see supra* note 83, requires Edge Act corporations to supervise their subsidiaries and to ensure compliance with sound banking policies. Regulation K specifically requires the Edge Act corporation to develop systems to provide "information on . . . conformance to management policies." 12 C.F.R. §211.7(a). It should be noted that the requirement is for *information* regarding compliance with policy rather than control to ensure compliance.

upon the previously discussed Edge Act theory or, upon an alternative theory of liability, independent of the Edge Act. Judge Steel gave the following instructions to the jury relating to control independent of the Edge Act:

> As I have mentioned, CMOBC owns all the stock of Chase Jamaica. Chase Manhattan Bank, N.A. owns all the stock of CMOBC, and also owns all the stock of Chase Manhattan Overseas Corporation ("CMOC"). The Chase Manhattan Corporation owns all the stock of Chase Manhattan Bank, N.A.
>
> Each of these corporations is separately chartered. In the eyes of the law, a corporation is an individual person, with its own property, liabilities, rights and duties that are distinct from those of its shareholders.
>
> One corporation's mere ownership of all the stock of another does not in itself subject the owning or parent corporation to liability for wrongs of the owned or subsidiary corporation. However, under certain circumstances, an owning or parent corporation can be held responsible for wrongs of its subsidiary.
>
> Rose Hall contends that such circumstances exist here. With one exception I will point out, Rose Hall has the burden of showing the existence of such circumstances by the preponderance of the evidence.
>
> A parent corporation may, without thereby being possible for the actions of its subsidiary, exercise its power of stock ownership to elect, as directors of its subsidiary, persons identified with the parent who may be expected to exercise their powers as directors to run the subsidiary.
>
> However, the parent must respect the subsidiary's corporate offices and structure, and

must permit its decision-making to be done in a proper and regular way under the subsidiary's charter and bylaws. In Jamaica, Chase Jamaica's charter and bylaws are called its Memorandum and Articles of Association.

A parent corporation may be liable for the wrongs of its subsidiary if it controls the subsidiary in the commission of those wrongs or if it causes that subsidiary to be controlled from outside itself, as to major policy decisions and actions as to those wrongs, and without regard to the subsidiary's corporate offices and structure.

This outside control must amount to complete domination of the subsidiary's major policy decisions and actions so that the subsidiary at the time had no separate mind, will, or existence of its own.

For purposes of this principle, it would not matter whether CMOBC exercised control over Chase Jamaica directly by CMOBC itself, or indirectly by Chase Manhattan Bank, N.A. and/or CMOC. In either event, if you find that CMOBC controlled Chase Jamaica in a way that disregarded the subsidiary's corporate offices and structure, and that Chase Jamaica's major policy decisions and actions involved in this lawsuit were thus taken in disregard of Chase Jamaica's corporate offices and structure, then you should find CMOBC liable for the wrongs of Chase Jamaica.

(Dkt. 858, Tr. 15, 535-37).

The jury responded negatively to the question of control independent of the Edge Act and plaintiff seeks judgment notwithstanding the verdict or, in the alernative, a new trial on the basis that the evidence does not support the jury's verdict.

As with many or Rose Hall's contentions, its theories are not readily subject to discernment. Invocation of

talismanic "equitable" principles appear to form the basic thrust of plaintiff's arguments. Nonetheless, the theories appear to break down into two general categories: first, an "indirect control" theory based upon the chain of command among the various Chase entities; and second, an "indirect control" theory based upon a formalistic argument that Chase Jamaica, through its managing director[97] Brown, could not have acted independently and since there is no evidence of action by the Chase Jamaica board, the action must, somehow, be attributed to CMOBC.

As to the first argument, the Court has previously discussed the lack of evidence supporting a finding that CMOBC controlled Chase Jamaica's specific actions at issue here in relation to the Edge Act theory. *See supra* pp. 167-169. These facts are equally applicable to the question of control independent of the Edge Act. This, however, does not end the inquiry because the jury was instructed that "it would not matter whether CMOBC exercised control over Chase Jamaica directly by CMOBC itself, or indirectly by Chase Manhattan Bank, N.A. and/or CMOC." (Dkt. 858, Tr. 15,537). This language is based upon the theory that CMOBC delegated, or deputized, its control of Chase Jamaica to either CMOC or Chase Manhattan Bank, N.A.[98] The jury responded

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97. Under Jamaican law, a managing director is analogous to a chief executive officer in American parlance. The Articles of Association of Chase Jamaica provide that the directors of Chase Jamaica may appoint a managing director and "may entrust to and confer upon [him] any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit." PX 5, ¶109 at 33.

98. The genesis of the indirect control language is somewhat sketchy. It was included in the Proposed Pre- Trial Order (Dkt. 664, p. IV-7), and the Proposed Jury Instructions of Plaintiff Rose Hall Ltd. (Dkt. 764, pp. 47-48). This issue was discussed at the Third Pretrial Conference where Judge Steel recognized plaintiff's deputization theory but similarly recognized that CMOBC must have ultimately controlled the specific actions of Chase Jamaica. Judge

negatively to Interrogatory No. 3 and implicitly found control by neither CMOBC nor Chase Manhattan Bank, N.A. nor CMOC. Rose Hall argues that CMOBC was simply a vehicle through which Chase Manhattan Bank engaged in international banking and that CMOBC in fact had no control function of its own. At least part of this contention is true—CMOBC is an Edge Act corporation established by its parent to engage in foreign banking. It does not necessarily follow, however, that even if CMOBC had no separate control function it is liable for Chase Jamaica's actions on the basis of an indirect control theory.

Rose Hall effectively argues that Chase Manhattan Bank controlled all of Chase Jamaica's actions and that CMOBC should thus be liable. This around the horn logic is novel at best. Adoption of this contention would allow a plaintiff to sue any member of a corporate family for the actions of another member of the corporate family. The Court need not pass on this contention because Rose Hall has failed to meet its burden of proving that Chase Jamaica was controlled from outside itself with respect to the specific actions and decisions involved herein.

Plaintiff relies on the manuals, PX 323 and PX 324, to establish that control of Chase Jamaica's actions existed outside Chase Jamaica. It is clear that the subsidiaries were expected to conform to the structure of the manuals regarding the administration of loans. As an

NOTES *(Continued)*

Steel stated: "In substance there can be no liability on the part of [CMOBC] unless [CMOBC] controlled. Now, that control can be exercised by delegation to third parties, by either persons or corporations. . . ." (Dkt. 579, p. 126). It should be remembered that plaintiff had to prove that CMOBC controlled the specific actions at issue, a finding of mere general control would be insufficient and the jury was so instructed. *See supra* note 46; *see also* 1 *Fletcher Cyclopedia of Corporations* §43 (Perm.Ed.) (1982 Pocket Part) pp. 65-66 (control of specific transaction required to hold parent corporation liable for the actions of a subsidiary).

example, any material change in the creditor status required prior approval of an officer with proper lending authority.[99] Morley, Conigliaro and Giberga, all officers of Chase Jamaica, had the requisite authority to approve Brown's actions with regard to the Rose Hall collateral. Although these individuals held offices in other Chase entities as well, the jury could and obviously did reasonably conclude that they were acting in their capacities as Chase Jamaica board and executive committee members. *See infra* p. 172. Plaintiff, therefore, failed to prove that Chase Manhattan Bank or any other Chase entity controlled Chase Jamaica in these specific matters. *A fortiori,* plaintiff has failed to prove that CMOBC indirectly controlled Chase Jamaica's specfic actions at issue.

The record contains substantial evidence of general control of Chase Jamaica by various Chase entities. *See e.g.*, PX 332, PX 333, PX 365. At first blush this evidence would appear damning. It must be kept in mind, however, that this is only evidence of general control and bears no relation to the required showing of specific control of the actions at issue. Interrogatory No. 3, however, referred specifically to control of Chase Jamaica's sale of the collateral and the prevention of the interference lawsuit. *See supra* note 46. Plaintiff has failed to point the Court to any evidence of outside control of Chase Jamaica in the specific actions at issue which would warrant setting aside the jury verdict.[100]

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99. Material change includes foreclosure. PX 323, § IV.

100. Rose Hall made the argument to the jury that Chase Manhattan Bank controlled all of these banking entities and that their subsidiary status was ignored. (Dkt. 853, Tr. 14,896-900; Dkt. 856, 15,386-87). The jury, however, rejected this contention and the jury's verdict is neither against the clear weight of the evidence nor wholly unsupported by the evidence. It is not this Court's province to invade the jury's function and overturn its conclusion based upon the evidence before it.

The second argument raised by Rose Hall focuses upon the alleged non-observance of corporate formalities thereby indicating that Chase Jamaica's actions must be attributed to CMOBC. Rose Hall strenuously argues that Brown, Chase Jamaica's Managing Director, had no lending authority at the time of the sale of the Rose Hall land and shares. *See* PX 333. Thus, Brown was subject to control outside Chase Jamaica because he had to report to Giberga and others. The people to whom Brown reported—Giberga, Morley and Conigliaro—were, however, all members of the Board of Directors of Chase Jamaica.[101] While it is true that these individuls held titles in other Chase entities, this fact, in and of itself, does not support plaintiff's argument that CMOBC exercised control through those entities.

Rose Hall also argues that any consultations with members of the Chase Jamaica Board are not reflected in the minutes of Chase Jamaica and are therefore the actions of some other entity. CMOBC counters this argument by saying that the failure to keep minutes does not support the premise that the act did not occur; rather, the requirement of corporate minutes represents simply an evidentiary means to establish the evidence of

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101. Plaintiff argues that Sigarreta, a director of CMOC, who at the time was not on the Board of Chase Jamaica, was a supervisor to whom Brown reported. The evidence indicates, however, that Sigarreta was an assistant to Giberga in his capacity with CMOC, and provided services as an adviser to Chase Jamaica pursuant to a written agreement between CMOC and Chase Jamaica. (Dkt. 809, Tr. 6451-55). The jury reasonably could have found that Sigarreta was acting in his capacity as an advisor to Chase Jamaica. Futhermore, the uncontradicted testimony of Sigarreta states that he became a member of the Chase Jamaica board in October of 1976. (Dkt. 834, Tr. 11,208). Plaintiff also argues that since the Rose Hall loan was a criticized loan, *see supra* note 62, more stringent controls were placed upon review and administration of the loan. This argument misses the point, however, because, as plaintiff admits, Morley and perhaps Sigarreta had the requisite authority to review criticized loans. (Dkt. 772, p. A-17).

corporate actions. CMOBC, however, misses the mark with this argument. The failure to keep minutes might constitute one indicia of support for a finding that corporate formalities were not observed and thus might provide some support for disregarding separate corporate entities, but this does not support a finding that Chase Jamaica's actions were controlled by CMOBC. Furthermore, Brown, Giberga, Morley and Conigliaro constituted the executive committee of Chase Jamaica and under the Articles of Association could exercise all of the Board's powers. *See* PX 5, ¶¶ 102-104 at 32; PX 365. While sufficient evidence exists to support a finding of indirect general control, the evidence does not support a finding of indirect specific control.[102] The verdict is not against the clear weight of the evidence and will not be disturbed.

In summary, plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, new trial, must be denied in all respects. The Edge Act does not require a finding of control as a matter of law. Similarly, the evidence does not warrant overturning the jury's verdict that CMOBC successfully rebutted the Edge Act presumption of control and that plaintiff failed to estab-

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102. Plaintiff once again retreats to the manuals to support its general allegation. The same response is once again relevant. The manuals are simply generalized statements of policy and do not, in and of themselves and in the face of the testimony of CMOBC witnesses, justify overturning the jury's response to Interrogatory No. 3 that CMOBC did *not* directly or indirectly control Chase Jamaica's actions. Rose Hall also alleges that Chase Jamaica had no local lending authority of its own but rather all decisions had to be cleared with CMOC or Chase Manhattan Bank. This contention is supported by documentary evidence. (PX 332; PX 333). Nonetheless, the required approvals were obtained from Morley, Giberga and Conigliaro—all board and executive committee members of Chase Jamaica—and the jury could have, and obviously did decide that they were acting in their capacity as Chase Jamaica directors rather than in their capacities with other Chase entities. The Court will not disturb this jury finding.

lish control independent of the Edge Act. Plaintiff, by failing to adduce any evidence of CMOBC's control of the specific actions taken by Chase Jamaica with respect to the Rose Hall collateral and the prevention of the interference claim, can satisfy neither the standard for judgment notwithstanding the verdict nor the standard for new trial.

VII. *Rose Hall's Conditional New Trial Issues*

Rose Hall also argues that if a new trial is granted for any reason, two issues should be reconsidered and included in such a new trial. These issues are: first, Rose Hall's motion to amend the complaint to allege certain Jamaican law torts against Holiday Inns should be granted; and second, the amount of damages for the sale of the 3000 acres of land should be reassessed. These arguments are only conditional because they are premised on a grant of a new trial.[103] The Court has declined to grant a new trial, except in the event its grant of judgment notwithstanding the verdict is reversed, in which case there is a grant of new trial limited to the theory encompassed by Interrogatory No. 4. Nonetheless, in the hope of obtaining appellate court guidance should there be a reversal and in keeping with the spirit of Fed.R.Civ.P. 50(c), the Court will consider Rose Hall's contentions.

A. *Rose Hall's Amendment to Allege Certain Jamaican Tort Claims Against Holiday Inns*

The original April 11, 1979 complaint in this action alleged liability on the part of Holiday Inns premised upon three theories all involving conspiracy. Certain of these claims were considered barred on the basis of *res judicata* by the Georgia judgment. *See Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F.Supp.

103. Dkt. 772 at p. 22 and 31-32; Dkt. 775; Dkt. 869.

1139 (D.Del.1980), *modified*, 494 F.Supp. 1158 (D.Del.1980). Rose Hall amended its complaint on July 1, 1980 to conform with Judge Steel's ruling and to specifically allege a conspiracy between Chase Jamaica and Holiday Inns regarding the sale of the Rose Hall (H.I.) stock and the 3000 acres of land.[104]

Massive discovery proceeded and on October 9, 1981, Rose Hall moved to set the case for trial. (Dkt. 182). The Court denied this motion and set a March 31, 1982 discovery cut-off date. (Dkt. 197). After having moved for trial and after discovery was virtually complete, Rose Hall filed a Motion to Amend the complaint on January 11, 1982. (Dkt. 233). The amendment sought to assert Jamaican tort claims against Holiday Inns' alleging malicious falsehood, intimidation, and inducing another to commit an actionable wrong. *Id.*[105] The motion was denied from the bench (Dkt. 252), but *sua sponte* the Court granted reargument. (Dkt. 255). After a deluge of briefs and appendices,[106] Judge Steel denied leave to amend. *Rose Hall Ltd. v. Chase Manhattan Banking Corp.*, 93 F.R.D. 858 (D.Del.1982). (Dkt. 354, 381).

Plaintiff litigated its conspiracy theory against Holiday Inns and, having lost on that ground, it now seeks to resurrect its Jamaican tort claims. Rose Hall does not challenge the jury's verdict on the conspiracy claim in either its motion for judgment notwithstanding the verdict or new trial. Nor has Rose Hall provided any new

104. The conspiracy claims in the Amended Complaint involved: first, Count I, conspiracy regarding the "cheap sale"; second, Count II, an admitted restatement of Count I (*see* Dkt. 44); and third, Counts IV and V, conspiracy to ensure Holiday Inns was not sued by Rose Hall (H.I.) (Dkt. 56). The conspiracy aspects of the case were submitted to the jury in Interrogatory No. 5. The jury answered Interrogatory No. 5 negatively thereby exonerating Holiday Inns from any liability.

105. These claims will be collectively referred to as "Jamaican torts."

106. *See* Dkt. 244, 247, 271, 271A, 282-287, 291-293, 318, 328.

argument not presented in the voluminous briefs in support of the motion to amend. As such, this Court finds that Judge Steel properly denied the motion to amend and that ruling will not be disturbed. Since no new arguments have been presented, only a brief recitation of the basis for the denial of the motion is warranted.

It is axiomatic that motions to amend pursuant to Fed.R.Civ.P. 15(a) should be freely granted "when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). It is equally clear, however, that an amendment should be denied when the other party suffers undue prejudice or when there has been "bad faith or dilatory motives, truly undue or unexplained delay." *Heyl v. Patterson International, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir.1981).

Judge Steel found that an actual showing of bad faith was unnecessary in this case because the long delay in asserting the Jamaican tort claim was unexplained. 93 F.R.D. at 865. Judge Steel stated:

> In the instant case it is not necessary for the Court to find that plaintiff has acted in bad faith in seeking the amendment. It is clear that plaintiff has provided no satisfactory explanation for its long delay in filing its motion to amend. Undue delay which is not satisfactorily explained is equivalent to bad faith.

Id.

Rose Hall asserts that delay alone cannot support the denial of a motion for leave to amend. *Deakyne v. Commissioners of Lewis*, 416 F.2d 290, 300 n. 19 (3d Cir.1969). Plaintiff, however, misperceives the thrust of *Deakyne* and its application to this case. As Judge Steel found, this case was not one of simple delay. The delay was coupled with the clear and uncontroverted fact of plaintiff's knowledge of the existence of a cause of action for the Jamaican torts and all of the facts underlying

such a cause of action.[107] In light of the unexplained delay, the onerous burden placed upon Holiday Inns by a grant of plaintiff's motion justified the denial of leave to amend. This Court adopts Judge Steel's reasoning and reaffirms the holding that the unexplained delay [108] in filing the Jamaican tort claims is tantamount to bad faith and leave to amend properly was denied.[109]

B. *Rose Hall's Dissatisfaction With the Jury Instruction Relating to Damages for the Sale of the 3000 Acres of Land*

Rose Hall contends that if a new trial is granted for any reason, the jury should be instructed differently as to

107. Plaintiff had been apprised of the existence of a Jamaican cause of action by its Jamaican attorney, Richard Mahfood, as early as August 26, 1979. (Dkt.271A, pp. 11-10). The facts underlying the Jamaican tort claims are identical to those underlying the conspiracy claims which were presented in the original and first amended complaint.

108. Before Judge Steel, plaintiff attempted to explain the delay in asserting the Jamaican tort claims as caused by an addition of counsel within plaintiff's firm and new counsel's desire to review Jamaican law. Judge Steel rejected this explanation because the pleading could and should have included the claim based upon the Mahfood memorandum which would have satisfied the Fed.R.Civ.P. 11 good faith requirement. 93F.R.D. at 864. Plaintiff also resurrects the argument that it was not until October 10, 1980 when defendants produced the Lapwing memorandum (PX 109)—allegedly supporting a finding that Holiday Inns coerced Chase Jamaica into selling the collateral—and some subsequent events that plaintiff discovered support for this alternative theory of liability. As Judge Steel correctly noted, "This, of course, provides an explanation why the motion to amend was filed when it was. It is no explanation why the amendment was not filed shortly after the first amended complaint had been filed on July 1, 1980." 93 F.R.D. at 865.

109. In light of this holding, the Court need not address Holiday Inns' contentions regarding the plaintiff's bad faith or the prejudice that would be occasioned by the amendment if granted, in the form of substantial and unnecessary additional discovery, some of which would undoubtedly have to take place in Jamaica, delay-induced memory loss and the erection of wholly separate defenses.

amount of damages for the sale of the 3000 acres of land. Judge Steel gave the follwing instruction to the jury:

> If you have answered "Yes" to Question 1., the measure of damages is the difference between the actual price realized and what the best available price would have been if Chase Jamaica had acted in good faith without reckless disregard for the interests of Rose Hall, Ltd., taking reasonable precaution to obtain the best available price and to avoid unreasonable sale of excess collateral. This is so regardless of what your answer is to question [3, 4 or] 5.

(Dkt. 858, Tr. 15,548-49). Judge Steel also instructed the jury that "In exercising its power of sale, a bank owes a duty to its borrower to act in good faith, and not in reckless disregard of the borrower's interests, and to take reasonable precautions to obtain the best available price for the collateral on the date of sale." (Dkt. 858, Tr. 15,519). Judge Steel defined best available price for the jury as "the highest price that might have been obtained if the bank had acted properly in selling the collateral." (Dkt. 858, Tr. 15,520). Finally, Judge Steel explained to the jury that the bank need not wait for an improvement in the market before selling the collateral of a loan in default; rather, the bank remains free to choose the time of sale in its own interest. (Dkt . 858, Tr. 15,520).

Rose Hall argues that these instructions were erroneous for two related but distinct reasons: first, the instructions apply best available price to a "forced sale" of what Rose Hall terms excess collateral; and second, the construction of best available price fails to adequately consider what plaintiff charitably characterizes as the land's fair market value.

The simple answer to these contentions is that Judge Steel has previously considered and rejected Rose Hall's

request. The Magistrate's Opinion on Jamaican law[110] dated September 24, 1982, and adopted by Judge Steel embraces the following statement of the law:

> Where a mortgagee has breached its duty in selling mortgaged property, the appropriate measure of damages is not the replacement value of the property but is the difference between the best available price and the actual sale price.

Dkt. 559 at 3, *adopted,* Dkt. 631. The Court perceives no rational basis to deviate from this holding.

Rose Hall argues that the best available price represents a forced sale price that, at best, can be applied only to a sale which does not encompass excess collateral. In other words, Rose Hall contends that even if the best available price standard would apply to a sale of the proper amount of collateral, a so-called fair market value should apply to a sale of any excess collateral. This exercise in semantics leads nowhere. Selling too much collateral has the same legal and economic effect as selling the correct amount of collateral at too low a price. Since Judge Steel expressly charged the jury on sale of excess collateral, there is no error.

Without citation to authority,[111] plaintiff argues that fair market value, based upon an optimistic and speculative subdivision plan encompassing 15 year projections, constitutes the proper measure of damages. Plaintiff, through its witness "Pat" McDaniel, sought to demonstrate a future value in excess of $20 million (Dkt.

110. There is no dispute that Jamaican law governs the assessment of damages.

111. Rose Hall failed to cite a single authority to support its contentions. It did append a self-serving interoffice memorandum which discusses Jamaican and American trust and eminent domain law. *See* Nov. 21, 1982 Memorandum, Dkt. 772, App. D. These principles are irrelevant to the issue at hand.

803, Tr. 5084-86, 5090, 5115; PX 719(A)), and relied heavily on this opinion in its closing argument. (Dkt. 853, Tr. 14,995-97; Dkt. 856, Tr. 15,359-60). In reality plaintiff's "fair market value" construction simply represents a speculative future value. It bears little, if any, relationship to the current fair market value—the price a property will bring in an open market.[112] Therefore, plaintiff's contentions are not only irrelevant, they are incorrect.

For the foregoing reasons, both plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, new trial, and its conditional motions for new trial will be denied in all respects. The Court now moves to a discussion of costs.

VIII. *Costs*

In the Judgment Opinion, this Court deferred the taxation of costs until disposition of all motions for judgment notwithstanding the verdict. Presently, the Court undertakes consideration of this issue which was previously briefed by the parties.[113]

Fed.R.Civ.P. 54(d) provides, in pertinent part, that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." *See also* Local Rule 6.1 A(1). Local Rule 6.1 C provides that "[t]he determination of the prevailing party shall be within the discretion of the Court. . . ."

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112. Actual fair market value reflects anticipated future, fully developed value. It does not, however, equate the two concepts. Plaintiff's strained definition of fair market value fails to consider development costs, carrying charges and the vicissitudes of Jamaican economics.

113. The parties' main arguments relating to costs are set forth in Dkts. 758, 762; an April 28, 1983 letter to the court from Paul P. Welsh, Esq.; an April 29, 1983 letter to the Court from Charles S. Crompton, Jr., Esq.; and a May 3, 1983 letter to the Court from Peter Q. Bassett, Esq.

This Court has entered judgment in favor of Holiday Inns against Rose Hall on all claims. (Dkt. 773). Plaintiff, however, objects to the award of costs to this prevailing party because it claims that the jury has found Holiday Inns to be a "wrong-doer" even though no judgment could be entered against it in this case. By its affirmative response to Interrogatory No. 2 and its assessment of corresponding damages of $4,500,000 in Interrogatory No. 6, the jury necessarily found that Holiday Inns interfered with the proposed $13 million sale of the hotel to the U.D.C. In this action, however, Holiday Inns could not be sued directly for the interference;[114] rather, it was sued only on a conspiracy theory of liability, which the jury rejected in Interrogatory Nos. 5(A), (B) and (C).

[67] Plaintiff contends that an award of costs to Holiday Inns which "stands before the Court, with hands the jury has found to be dirty" would be greatly unjust and erroneous. Letter from Paul P. Welsh, Esq. to Hon. Edwin D. Steel, Jr. (April 28, 1983). Secondly, plaintiff urges that if costs are awarded to Holiday Inns, they should be awarded only against CMOBC. This Court cannot accept plaintiff's contentions. In this action, the claims against Holiday Inns were tried only on a theory of conspiring with Chase Jamaica in 1) the cheap sale of the land and shares of Rose Hall (H.I.) referenced in Interrogatory Nos. 1 and 5(A), (B), and 2) the wrongful prevention of plaintiff's interference suit against Holiday Inns, referenced in Interrogatory Nos. 2 and 5(C). Holiday Inns prevailed on all claims asserted against it in this

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114. Rose Hall sued Holiday Inns in Georgia for wrongful interference with the $13 million sale negotiations on September 30, 1976. The Georgia court held, without determining the merits of the interference claim, that such a suit could only be brought by Rose Hall (H.I.). *Rose Hall Ltd. v. Holiday Inns, Inc.*, C.A. No. C227-30 (Ga.Super. Ct., Fulton Cty., filed Sept. 30, 1976), *aff'd*, 146 G.App. 709, 247 S.E.2d 173, *cert. denied*, No. 55491 (Ga. Oct. 3, 1978).

action. Even though the jury verdict indicates that Rose Hall (H.I.), a nonparty to this action, would have prevailed in an interference lawsuit against Holiday Inns, if it were able to bring one, this is an insufficient basis for denying costs to Holiday Inns in the present action. This is particularly true because the jury has determined that Holiday Inns in no way conspired with Chase Jamaica in the prevention of that interference lawsuit. (Interrogatory No. 5(C)).

[68] Rose Hall's second contention, that any costs awarded to Holiday Inns should be taxed against CMOBC, loses its force when viewed in the current posture of the case. This Court will enter judgment notwithstanding the verdict for CMOBC on the fraud on the Jamaican court issue, referenced in Interrogatory No. 4. Consequently, CMOBC cannot be held liable for any wrongs committed by Chase Jamaica and corresponding damages assessed by the jury. Therefore, CMOBC is a prevailing party, entitled to costs against Rose Hall. There is no reason to tax costs in favor of one prevailing defendant, Holiday Inns, against another prevailing defendant, CMOBC.

For these reasons, Holiday Inns' and CMOBC's costs will be taxed against the plaintiff.

IX. *Conclusion*

The Court concludes that CMOBC's motion for judgment notwithstanding the verdict must be granted with respect to the claim that the Jamaican court was deceived by Chase Jamaica, as a result of control by CMOBC. With one exception, all other grounds for judgment notwithstanding the verdict or new trial brought by either party have been rejected. Only if this Court is reversed on its grant of the judgment notwithstanding the verdict as to the deceit on the Jamaican court issue is defendant entitled to a new trial. In that event, unless otherwise instructed by the appellate court, the trial

would be limited to Rose Hall, Ltd. and CMOBC as the parties and Interrogatory No. 4 as the subject matter.

FINAL JUDGMENT

Pursuant to the October 18, 1983 Order of the Honorable Murray M. Schwartz,

IT IS ORDERED AND ADJUDGED:

1. That final judgment is hereby entered in favor of defendant Holiday Inns, Inc. and against Rose Hall, Ltd., as to all claims by Rose Hall, Ltd., against Holiday Inns, Inc.

2. That final judgement is hereby entered for defendant Chase Manhattan Overseas Banking Corporation and against Rose Hall, Ltd., as to all claims by Rose Hall, Ltd., against Chase Manhattan Overseas Banking Corporation except those claims relating to the outparcels which were dismissed with prejudice on the motion of plaintiffs and with defendants' consent.

3. That costs are hereby assessed in favor of defendant Holiday Inns, Inc. and defendant Chase Manhattan Overseas Banking Corporation and assessed against plaintiff Rose Hall, Ltd.

4. That defendant Chase Manhattan Overseas Banking Corporation's Motion for New Trial is granted, limited to Rose Hall, Ltd. and Chase Manhattan Overseas Banking Corporation as the parties and interrogatory No. 4 as the subject matter, said grant of new trial to take effect only in the event that the ruling of the Court granting defendant Chase Manhattan Overseas Banking Corporation Judgment notwithstanding the verdict and the order implementing said ruling contained in paragraph 2 above is reversed on appeal.

5. That plaintiff Rose Hall Ltd.'s motions for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial and Motion for New Trial are denied.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 79-182

ROSE HALL, LTD.,

Plaintiff,

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION and HOLIDAY INNS, INC.,

Defendants.

The Honorable James M. Tunnell, Jr., and Paul P. Welsh, Esquire of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, attorneys for plaintiff.

Charles S. Crompton, Jr., Esquire and David B. Brown, Esquire of Potter Anderson & Corroon, Wilmington, Delaware, attorneys for Chase Manhattan Overseas Banking Corporation and Milbank, Tweed, Hadley & McCloy, New York, New York, of counsel.

Henry N. Herndon, Jr., Esquire of Morris, James, Hitchens & Williams, Wilmington, Delaware, attorney for defendant Holiday Inns, Inc. and Ronald L. Reid, Esquire and Peter Q. Bassett, Esquire, of Altson, Miller & Gaines, Atlanta, Georgia, of counsel.

OPINION RE MOTION OF ROSE HALL TO ADD PARAGRAPH 54 TO THE COMPLAINT

Wilmington, Delaware
September 30, 1982

Steel, Senior Judge:

Plaintiff has moved to add paragraph 54 to the complaint to allege an alternative theory of liability of Chase Overseas. The theory is that the testimony of Brown, the general manager of Chase Jamaica, defrauded the trial court in Jamaica and thereby induced it to deny plaintiff's attempt to enjoin Chase Jamaica from selling the collateral. The court's refusal was based on its holding that plaintiff's legal remedy of damages was adequate since, based on Brown's representations and contrary to fact, Chase Jamaica had sufficient assets in Jamaica to pay for any judgment that might be recovered by the plaintiff. Plaintiff's theory that the relationship between Chase Jamaica and its parent, Chase Overseas, was such that this fraud, if proven, was relevant when considered with other evidence to render Chase Overseas liable for the alleged "cheap sale" by Chase Jamaica of plaintiff's collateral.

Chase Overseas objects to the amendment. It argues that plaintiff has been guilty of undue and unexplained delay in attempting to file the amendment and in any event it has been prejudiced by its late filing.

Undue Delay

It is true that by November 6, 1981, plaintiff had concluded that Mr. Brown had made misrepresentations to the Jamaican court during the injunction proceedings. On this date, "Rose Hall filed in the [Jamaican] court of appeal the affidavit of Thomas Reed Hunt, Jr., attaching the memoranda showing the falsity of the representations Brown had made to Justice Rowe. . . ." (Doc. 512, p. 20 fn; Doc. 524, p. 5).

Despite this knowledge of the facts supporting the fraud theory, plaintiff's lawyers did not formulate their fraud theory as an alternative base for Chase Overseas' liability until June, 1982. (Doc. 552). Until then plaintiff had relied upon the vitality of this Court's earlier ruling

that the Edge Act and other activities of Chase Overseas with respect to Chase Jamaica provided a basis for plaintiff to argue that Chase Overseas had controlled Chase Jamaica in its wrongful acts. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F. Supp. 1139, 1151-56 (D. Del. 1980) (denying Chase Overseas' motion to dismiss). However, on June 8, 1982, (Doc. 452) Chase Overseas filed a motion for summary judgment in which it disputed that the Edge Act provided a basis of liability and asserted for the first time its claim that the Edge Act created no private right of action. This point was pressed in a motion for reargument on June 17. (Doc. 466, p. 2-3) At this point, plaintiff found itself compelled to resist defendant's attacks on the Edge Act theory of liability and focused on and formulated the alternative fraud theory embodied in paragraph 54 and so advised defendant.

I have concluded that plaintiff has provided a satisfactory explanation for its ostensible delay in filing its motion to amend paragraph 54.

Prejudice to Defendant

The defendant has the burden of demonstrating that it will be prejudiced in defending on the merits the theory which the amendment seeks to introduce. *Deakyne v. Commissioners of Lewes*, 416 F.2d 290 (3d Cir. 1969).

To substantiate its claim of prejudice Chase asserts that it will be required to research and obtain discovery with reference to points of specified Jamaican law and to possibly interview and take the depositions of a number of individuals whom it names.

Thus far defendant has not interviewed the persons whom it claims *may* be helpful to it in defending against the fraud charge.* What they *may* be able to testify to is

* I possibly may have been responsible for this. (Doc. 495, pp. 24-25).

not known. Because of their relations with one or more of the Chase affiliates they are all presumably friendly to Chase. There has been no showing that they are unavailable or unwilling to appear at trial as witnesses, and if they cannot or will not appear at the trial, their testimony is so important that their depositions will have to be taken. With the legal manpower at Chase's disposal, it should not be difficult to conduct interviews, either by telephone or personally, to ascertain whether any of the witnesses can importantly contribute to the fraud defense and can appear at the trial.*

Defendant has known since the time when the complaint was filed that plaintiff claimed that by early 1976 Chase had decided to close down its Jamaican operation and liquidate as quickly as possible all of its loans in Jamaica. (Complaint ¶18). Chase denied this assertion and much discovery has already been taken about it. There is no reason for further discovery on this point.

Defendant argues that it should have an opportunity to take the depositions of plaintiff's principals, Rollins, Weaver, Weitzel and its legal advisors, Hart and Barnet. This is importantly tied to the defense that the fraud claim is barred by the Delaware three year statute of limitations. Defendant anticipates plaintiff may defend against the statute by asserting that it did not know of defendant's wrongdoings because of the fraudulent concealment by the defendant. To meet any such attempt by plaintiff to avoid the application of the statute, defendant claims it is important for it to show that the plaintiff, through its principals and the Jamaican attorneys, failed to exercise reasonable diligence in discovering its claim.

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* Chase Overseas is represented by three lawyers in Wilmington from the Firm of Potter Anderson & Corroon and in New York by two lawyers from Milbank, Tweed, Hadley & McCloy. The latter, because of its size, undoubtedly has many more lawyers to call upon for aid in interviewing witnesses as may be required.

(Doc. 502, p. 9). The need for the defendant to take the depositions in question finds its answer in the fact that the statute is no bar. Rule 15(c) reads:

> "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The proposed amendment alleges a claim which arises out of the same transaction set forth in the original pleading, i.e., the 1976 sale of Rose Hall (H.I.) shares and the 3,000± acres of land. The amendment asserts the defendant's use of fraud on the Jamaican court to advance this same sale. It is in effect an additional theory for holding Chase Overseas liable for the damage caused to Rose Hall by the sale. The amendment relates back to the original pleading and the statute therefore is no bar.

Defendant's asserted need for taking depositions on the Jamaican law rests upon two questions: first, whether fraud was committed on the Jamaican court by Chase Jamaica; and second, if it was, whether Chase Overseas can be held liable for that fraud.

Paragraph 54 alleges a federal cause of action. Federal jurisdiction exists in "all suits" arising out of transactions involving international or foreign banking or out of other international or foreign financial operations in which an Edge Act corporation, such as Chase Overseas, is a party. Moreover, paragraph 54 seeks to impose liability on Chase Overseas. Paragraph 54 does not purport to base the liability of Chase Overseas on the Edge Act but rather independently of the Edge Act as an alternative basis of liability. Nevertheless the fact that jurisdiction is based on the Edge Act and that liability would be imposed on an Edge Act corporation supports the conclusion that paragraph 54 alleges a cause of action which is essentially federal.

When conflict of laws questions arise in connection with federal matters, the federal court can apply whatever substantive law, including the conflict rules, it deems applicable "to effectuate the federal policies underlying the substantive issue before the court." 1A (Part 2) *J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice*, ¶ .325 (2nd ed. 1982). *See Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), where the court held, at least inferentially, that where federal jurisdiction is based on the Edge Act and where the claim seeks to impose liability on, among others, a federally chartered bank entitled to Edge Act protection, it is appropriate to apply a federal common law choice of law rule.

In applying the federal choice of law rule, the court may or may not incorporate or refer to state conflict of laws rules. 1A (Part 2) *J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice* ¶ .325 (2nd ed. 1982). The first question, whether Chase Jamaica committed a fraud on the Jamaican court, is part of the federal matter. If the court follows the state conflict of laws rule, it will look to the place of the fraud. *Friday v. Smoot*, 211 A.2d 594, 597 (Del. Supr. 1965). The fraud was committed entirely in Jamaica. Application of the *Restatement (Second) Conflict of Laws* §145 (1971) contacts analysis leads to the same result. Unless, however, it appears that the elements of fraud under the law of Jamaica, which is rooted in Anglo-Saxon law, differ substantially from those general principles in the United States, the Court will presume they are the same. *See Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil Inc.*, 456 F. Supp. 831, 840 n. 17 (D. Del. 1978).

As to the second question, the liability of Chase Overseas as a stockholder for the wrongs of a subsidiary, Chase Jamaica, it is general law that the law of the state where the corporation was incorporated will govern. *Restatement (Second) Conflict of Laws* §307 comment (a) (1971). *See also*, 13 *W. Fletcher, Cyclopedia of Cor-*

porations §6208 p. 815 (1980) (the liability of the stockholder is governed by the law of the state in which the corporation was created). This principle, if applied, would make the law of Jamaica, under which Chase Jamaica was incorporated, controlling as to the liability of Chase Overseas. There are exceptions, however, to the rule and it is an exception that will be applied here. *See Restatement (Second) Conflict of Laws* §302(2) and comment (g) (1971). The plaintiff, by means of its proposed amendment, seeks to impose liability on Chase Overseas, an Edge Act corporation, for the wrongs of its Jamaican subsidiary. The overseas banking activities of Edge Act corporations are closely regulated by federal law. 12 U.S.C. §601-32 (1976). The United States has a significant policy interest in the application of its law to controversies involving rights and liabilities of Edge Act corporations. *See* 12 U.S.C. §632 (1976). Jamaica's policy interest, if any, is minimal in comparison with that of the United States. Therefore, the Court will apply the laws of the United States to the question of Chase Overseas' liability for the wrongs of Chase Jamaica.

The defendant has failed to carry its burden of showing prejudice will accrue to it by granting the amendment embodied in paragraph 54. Arguments relating to prejudice, not discussed, have been considered and deemed to be without merit.

The amendment in paragraph 54 will be granted.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 79-182

ROSE HALL, LTD.,

Plaintiff,

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION and HOLIDAY INNS, INC.,

Defendants.

ORDER

AND NOW, TO WIT, this 30th day of September, 1982, it appearing that plaintiff seeks to amend the second amended complaint by adding paragraph 54 thereto, and briefs for and against that action having been filed by the parties and considered by the Court,

IT IS ORDERED, for the reasons stated in the opinion filed on this date, that the second amended complaint shall be deemed to be amended by paragraph 54 having been added thereto.

Edwin D. Steel, Jr.

J.

EXCERPTS FROM JANUARY 27, 1977 OPINION DENYING ROSE HALL AN INTERLOCUTORY INJUNCTION

In the Supreme Court of Judicature of Jamaica

Suite No.E.211 of 1976

Between

Rose Hall Limited
Rose Hall (Developments) Limited

Plaintiffs

And

Chase Merchant Bankers Ja. Limited
Rose Hall (H. I.) Limited

Defendants

Heard: October 26, 27, 28, 29

November 2, 3, 4, 22, 1976

Richard Mahfood, Q.C., and Lloyd Barnett, instructed by Clinton Hart and Company for plaintiffs.

Norman Hill, Q.C., instructed by Judah, Desnoes and Company for first defendant.

David Muirhead, Q. C., instructed by Judah, Desnoes and Company for second defendant.

* * *

Rowe, J.:

As explained by Lord Diplock in *American Cyanamid v. Ethicon Limited,* (H.L. (E) 1975)) 2 W. L. R.316, a strict application of the "strong *prima facie* case" so-called rule, would mean that a court could not grant an interlocutory injunction unless it was first satisfied that if the case went to trial upon no other evidence that is before the court at the hearing of the application the plaintiff would be entitled to a permanent injunction in the same terms as the interlocutory injunction.

In my view such a test would place too great a burden of proof upon the plaintiff at the interlocutory stage of the proceedings and I respectfully adopt the following passage from the judgment of Lord Diplock at p. 323 of the report:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and nature considerations. These are matters to be dealt with at the trial. . . . So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

Earlier in his judgment, Lord Diplock in declaring that the so-called "strong *prima facie* rule" did not exist said:

> "The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried."

At the end of the hearing of the application before me, I held that there is a serious question to be tried as between the first plaintiff and the first defendant as to whether the offer for sale by the first defendant of the shares in Rose Hall (H.I.) Ltd. and the 3000 acres of land the property of the first defendant is at such a gross under-value as in itself to be evidence of fraud.

* * *

I concluded that the true market value of the land was greatly in dispute and could not possibly be determined by me on the evidence called on the application. The difference between the plaintiffs' valuation and defendants' valuation is so enormous, as in itself to give rise to a very serious question for trial. Although I am critical of the quality of the evidence produced by the plaintiffs to the market value of the 3000 acres of land when I apply the principle that the onus of proof is on the plaintiff's to show a proposed sale at a gross undervalue. I am satisfied that the plaintiff's contention is neither vexatious nor frivolous.

* * *

In the matters at issue between the plaintiffs and the defendants I am clearly of the view that damages would be an adequate remedy.

The evidence is that the first defendant's assets in Jamaica total approximately J$10,000,000. Its revenue deficit of $23,400 in 1975 was due mainly to the fact that it was not receiving interest at the rate of $20,000 per month from the plaintiffs on due dates. Quite apart from its own investment the first defendant acts as agent for its New York parent company in respect of that bank's direct investments in Jamaica. The first defendant stated that it proposes to continue in business in Jamaica. In the circumstances I am of the view that the first defendant is in a position to pay whatever damages might be awarded to the plaintiffs in this action.

It is unnecessary for me to consider the balance of convenience or as to whether the plaintiffs should be ordered to pay into court the amount of the debt as a condition to the grant of the injunction.

For these reasons I dismissed the application of the plaintiffs for the interlocutory injunction.

EXCERPTS FROM FEBRUARY 12, 1981 OPINION GRANTING ROSE HALL A STAY

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUITE NO. E 211 OF 1976

Between

Rose Hall Ltd.,
Rose Hall (Developments) Ltd.,

Plaintiffs

And

Chase Merchant Bankers Ja. Ltd.,
Rose Hall (H.I.) Ltd.,

Defendants

(Motion for stay of proceedings)

Heard: Nov. 27 & 28, Dec. 2 - 4, 1980

Richard Mahfood, Q.C., & Dr. L. G. Barnett for the Plaintiffs the applicants;

David Muirhead, Q.C., & J. Leo Rhynie for the Defendants the respondents.

February 12, 1981

Parnell, J:

On the 19th December, the Court ordered that all proceedings in the above action be stayed pending the hearing and determination of Civil Action 79-182 brought by Rose Hall Ltd., and Rose Hall (H.I.) Ltd., against Chase Manhattan Overseas Banking Corporation and Holiday Inns, Inc., in the United States District Court of Delaware. The question of costs was reserved. I promised to put my reasons in writing. This I now proceed to do.

* * *

An interim injunction was granted by a judge in chambers on October 4. It was to last for ten days. For four days, namely, November 2, 3, 4 & 22, 1976, arguments were advanced before Rowe, J on an application seeking an order to continue the interlocutory injunction until the trial of the action.

On January 27, 1977, the learned judge delivered a written judgment. He refused to extend the injunction against the defendants. They were then made free to sell or dispose of the mortgaged property in order to satisfy the outstanding debt owed to Chase Jamaica. At page 15 of the judgment Rowe, J had this to say:

> "In the matters at issue between the plaintiffs and the defendants, I am clearly of the view that damages would be an adequate remedy.
>
> The evidence is that the first defendant's assets in Jamaica total approximately J$10M. . . . The first defendant stated that it proposes to continue in business in Jamaica. In the circumstances, I am of the view that the first defendant is in a position to pay whatever damages might be awarded to the plaintiffs in the action."

What was before Rowe, J was this question; having regard to all the facts and circumstances as put before him and accepted by him, should the defendants have been restrained from selling or disposing of all or any of the mortgaged or pledged property until a hearing on the merits of the claim and the counter-claim. The defences were filed during the hearing. A battery of skilled and experienced counsel appeared for the parties.

It is now clear that the proposition that in November 1976 the first defendant:

> "proposed to continue in business in Jamaica"

is a debatable point. The plaintiffs apparently do not accept this contention. What is also clear is that what-

ever may have been the state of mind of the first defendant in November 1976, the position today is that it has ceased doing business in Jamaica and it has no assets in the country. It is beyond the reach of the jurisdiction of the Court. A judgment entered against Chase Jamaica in these days, would amount to what Plinius termed:

> "bruta fulmina et vana" (a thunderbolt which strikes blindly and harmlessly).

On April 11, 1979, Rose Hall Ltd., and Rose Hall (H.I.) Ltd. filed an action in the District Court of Delaware, against Chase Overseas and Holiday Inns Inc. The second plaintiff had to be pulled into the battle by a special procedure allowed by the rules of Court. It is an involuntary plaintiff. A lengthy complaint comprising of 49 paragraphs has been filed. The plaintiffs are asking for damages in the amount of $72M together with punitive damages to be assessed. Interest and costs are prayed for.

The claim is based mainly on the facts which I have attempted to outline. Tortious interference with negotiations between Rose Hall Ltd. and the Government of Jamaica touching the sale of the Hotel Asset at Rose Hall resulting in a non-consummation of an offer and acceptance of sale; conspiracy between the defendants to damage the plaintiffs and causing substantial damage thereby and a breach of fiduciary duty owed to Rose Hall Ltd. when the mortgaged property was being sold, are some of the counts mentioned in the complaint.

Motions to dismiss filed

Under the procedure allowed in Delaware, the defendants put up a fight. Motions were instituted to dismiss the action on various grounds. One of the grounds was forum non conveniens. It was not argued nor was it suggested that the defendants were not answerable in Delaware to the plaintiffs for the acts complained of in

Jamaica and which have an echo in the claim and counter-claim before me.

The motions to dismiss the action were dismissed. I have had an opportunity to read the opinion of Steel, Senior Judge in Delaware and dated March 31, 1980. The question as to whether Jamaica or Delaware was the proper forum to try the action was strenuously argued by Chase Overseas in the Delaware Court. Pages 26-30 of the opinion deal with this point. If I am permitted to say so, the judge's reasoning is impeccable and his judgment rests on a firm foundation. I shall quote excerpts from his opinion on the question of *forum non conveniens:*

(1) PP. 26-27:

> "The interest of Rose Hall in bringing the action in Delaware is beyond question. The indirect but ultimate beneficiary of the action, if successful, is John Rollins, a resident of Delaware. He owns all of the stock of Rollins Ja. Ltd; a Delaware corporation, which in turn owns all of the stock of Rose Hall, a Cayman Islands corporation. Chase Overseas is an Edge Act corporation, organized under 12 U.S.C // 611632 (1976) and has designated Newark, Delaware as its home office. This court has jurisdiction over questions arising under the Act."

The learned judge then deals with a point which was argued before me. Mr. Muirhead has contended on behalf of Chase Jamaica that the parties in Jamaica and the issues are not the same. But Chase Overseas did not support this contention.

(2) P. 27:

> "Chase Overseas argues that Jamaica is the proper forum in which to try this action since Rose Hall has previously begun an action there where the parties and issues are the same as in this action. This Jamaican suit is still pending."

It is difficult to follow the argument of Chase Overseas that the action against it in Delaware should be tried in Jamaica. Its subsidiary Chase Jamaica, never had assets in Jamaica to the value of U.S. $72M inasmuch as Chase Overseas is not amenable to the jurisdiction of the Jamaican Courts.

The learned judge then continues to deal with the issue:

(3) PP. 28-29:

> "Basically there are two reasons why Delaware rather than Jamaica is the proper jurisdiction in which to try this action. Chase Overseas, the defendant in Delaware, is not a party to the Jamaica suit and is beyond the reach of process there. Furthermore, this action involves the interpretation of the Edge Act, a federal law upon which Rose Hall importantly rests its claim. This can more appropriately be decided by a Court in the United States, particularly as the question here has never been decided."

Later on at page 29, the judge observes:

> "Whether, however, under the Edge Act, Chase Overseas can be held liable for the acts of wrong doing, if any, of its subsidiary Chase Jamaica, is solely an issue in this action. It comes with ill grace for Chase Overseas to argue that Rose Hall should be required to press its claim in Jamaica where it is at least doubtful whether a judgment, if obtained, can be satisfied."

* * *

On the facts before me, the plaintiffs have shown that it would be idle to litigate here. And what is very significant is that if either Chase Overseas or Holiday Inns Inc. was really serious and straightforward in their move to have the Jamaican action tried, one would have expected that an offer would have been made to pay

money into Court to abide the event of damages or costs being awarded against any of its agencies in Jamaica. But as it is, not even one dollar is available.

The evidence shows that Chase Jamaica is not even listed in the current telephone directory. The bird had flown to its parent and the parent is residing where the main interested party Mr. John Rollins is also resident. Mr. Rollins who is the main voice of the complaining company has the right to bring his action in Delaware. For substantial reasons he has done so. Why he should not be allowed to go on with his claim? And what is the fear of the defendants to face him there first in the encounter?

* * *

Summary of reasons

I shall outline in a summary from the main reasons why a stay has been granted in the terms already indicated.

(1) All the interested parties in both the Jamaican and American actions are Americans. The defendants reside in America and cannot be reached by the judicial process of the local court. Most of the material witnesses to be called reside in America.

(2) The subsidiary company (Chase Jamaica) no longer conducts business within the jurisdiction. There is no asset in Jamaica nor is there any money paid into Court to abide the event.

(3) As has been conceded by Chase Overseas in the court of Delaware, the issues and the parties both in Jamaica and in America are the same. But the Delaware action is more all embracing. It includes a charge of conspiracy against the

defendants to the detriment of Mr. Rollins and his company.

(4) Under section 48(e) of the Judicature Supreme Court Act, any person (whether plaintiff, defendant or otherwise) who is able to show a substantial interest in a suit may apply to the Court for a stay of proceedings until a certain event is satisfied. Lis alibi pendens, is only one of the grounds which may be urged in support of the motion.

(5) If the veil of incorporation is lifted, it will be shown that the real complainant is Mr. John Rollins, an American and a resident of Delaware. He has satisfied me that the continuance of his action in Jamaica would bring him no benefit whatever if he is successful and that the defendants will suffer no harm or injustice if the trial of his Delaware action proceeds.

(6) Every application for a stay of proceedings must be considered with reference to its own peculiar facts and circumstances. Citation of numerous cases decided abroad and having reference to different facts and circumstances tends to cloud the issues and unnecessarily to impinge on the area of substance. The law must serve the community. The social and economic conditions prevailing in the society at any given period must be observed when the law is required to operate. The stranger within and outside the gates should be made aware of this fact.

(7) The case of Mr. Rollins against Chase Overseas in Delaware has as its plinth, the proper interpretation of a 61 year old Federal Act (Edge Act). The Act still awaits an examination by the American Courts. Mr. Rollins should be allowed the opportunity to be the first litigant to ask for

the Court's interpretation without any delay or unnecessary expense. If he can blazen his name while reaping a benefit, the Court should not prevent him from running the race he has set himself.

* * *

On December 3, 1980, Mr. Muirhead informed the Court that his instructing attorney had received certain information from an American Attorney acting on behalf of Chase Overseas. The information was to the effect that in case, the three week action to begin in January 1981 did end in favour of the plaintiffs, Chase Jamaica would be supported to the extent of J$10M in satisfying the judgment. The Court then informed Mr. Muirhead that the instructing attorney should file an affidavit to the extent of what was disclosed in Court. Mr. Muirhead promised that this would be done.

On the 4th December, the last day of the hearing, Mr. Leo Rhynie informed the Court that in the course of that day, the instructing attorney would file the affidavit exhibiting the telex communication which was received. On the 5th December, the assurance given by Counsel was complied with. Mr. Michael Nunes, the instructing attorney, filed an affidavit and exhibited thereto, the telex communication which he received. The content of the message is interesting. I shall quote in part, the relevant portion of it.

> ". . . Chase Manhattan Overseas Banking Corporation has agreed to pay any final judgment that may be entered against Chase Merchant Bankers Jamaica Ltd., in the suit brought against it by Rose Hall Ltd., in the Supreme Court of Judicature of Jamaica up to the extent of Jamaican Dollars 10 million, provided however that the trial will not be delayed beyond its presently scheduled date of January 7, 1981."

But Mr. Nunes had a telephone conversation with Mr. Edward J. Reilly a member of the firm which represents Chase Manhattan Overseas Banking Corporation. The final portion of paragraph two of the affidavit of Mr. Nunes speaks for itself:

> "In telephone conversation with Mr. Reilly, he has made it clear that the agreement to pay herein is conditioned on the trial commencing as scheduled and continuing throughout on the dates as set out for hearing."

There is a French Proverb which runs thus:

> "With the help of an 'if' you might put Paris into a bottle."

A promise is susceptible to debility by a delicate condition or a disturbing stipulation introduced by an "if."

I am yet to read what is put forward as an "undertaking" which is hedged and bristled with such a condition that it makes what is proffered as worthless. The so called undertaking is worded in such a manner that if Counsel for the defendants had become ill on January 6, 1981 and his illness caused a delay of the proceedings by one or two days, there would have been no obligation to come to the rescue of Chase Merchant Bankers Jamaica, if it had found itself a loser at the end of the trial. I find that the"undertaking" given by Chase Overseas, is lame and it does not reflect anything resembling seriousness and reliability.

It is my view that by November 13 the defendants had sufficient time to instruct counsel concerning the posture to be exhibited towards the application for a stay. And after that date, I hold that any resistance offered to a very fair and just application was and is unreasonable and unwarranted. The move shows signs that it was more calculated to obstruct the course of justice than to achieve it. The trying of the Jamaican action would not

bar the prosecution of the claim based on conspiracy and breach of fiduciary duty in Delaware.

The defendants are, therefore, entitled to all costs incident to the application up and including November 13. Thereafter, the applicants are entitled to their costs including the costs of the hearing.

STATUTES AND REGULATIONS

12 U.S.C. §601: Authorization; Conditions And Regulations

Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Board of Governors of the Federal Reserve System for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:

First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States.

Second. To invest an amount not exceeding in the aggregate 10 per centum of its paid-in capital stock and surplus in the stock of one or more banks or corporations chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular possessions.

Third. To acquire and hold, directly or indirectly, stock or other evidence of ownership in one or more banks organized under the law of a foreign country or a dependency or insular possession of the United States and not engaged, directly or indirectly, in any activity in the United States except as, in the judgment of the Board of Governors of the Federal Reserve System, shall be incidental to the international or foreign business of such foreign bank; and, notwithstanding the provisions of section 371c of this title, to make loans or extensions of credit to or for the account of such bank in the manner and within the limits prescribed by the Board by general or specific regulation or ruling.

Until January 1, 1921, any national banking association, without regard to the amount of its capital and surplus, may file application with the Board of Governors of the Federal Reserve System for permission, upon such conditions and under such regulations as may be prescribed by said board, to invest an amount not exceeding in the aggregate 5 per centum of its paid-in capital and surplus in the stock of one or more corporations chartered or incorporated under the laws of the United States or of any State thereof and, regardless of its location, principally engaged in such phases of international or foreign financial operations as may be necessary to facilitate the export of goods, wares, or merchandise from the United States or any of its dependencies or insular possessions to any foreign country: *Provided, however,* That in no event shall the total investments authorized by this section by any one national bank exceed 10 per centum of its capital and surplus.

Such application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking or financial operations proposed are to be carried on. The Board of Governors of the Federal Reserve System shall have power to approve or to reject such application in whole or in part if for any reason the granting of such application is deemed inexpedient, and shall also have power from time to time to increase or decrease the number of places where such banking operation may be carried on.

12 U.S.C. §611: Formation Authorized; Fiscal Agents; Depositaries In Insular Possessions

Corporations to be organized for the purpose of engaging in international or foreign banking or other international or foreign financial operations, or in banking or other financial operations in a dependency or insular possession of the United States, either directly or through the agency, ownership or control of local institutions in

foreign countries, or in such dependencies or insular possessions as provided by sections 611-631 of this title and to act when required by the Secretary of the Treasury as fiscal agents of the United States, may be formed by any number of natural persons, not less in any case than five: *Provided*, That nothing in said sections shall be construed to deny the right of the Secretary of the Treasury to use any corporation organized under said sections as depositaries in Panama and the Panama Canal Zone, or other insular possessions and dependencies of the United States.

12 U.S.C. §632: Jurisdiction Of United States Courts; Disposition By Banks Of Foreign Owned Property

Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign, banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries, shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any defendant in any such suit may, at any time before the trial thereof, remove such suits from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. Such removal shall not cause undue delay in the trial of such case and a case so removed shall have a place on the calendar of the United States court to which it is removed relative to that which it held on the State court from which it was removed.

Notwithstanding any other provision of law, all suits of a civil nature at common law or in equity to which any Federal reserve bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits; and any Federal reserve bank which is a defendant in any such suit may, at any time before the trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law. No attachment or execution shall be issued against any Federal reserve bank or its property before final judgment in any suit, action, or proceeding in any State, county, municipal, or United States court.

Whenever (1) any Federal Reserve bank has received any property from or for the account of a foreign state which is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and holds such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to the Federal Reserve bank, the payment, transfer, delivery, or other disposal of such property by such Federal Reserve bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of the Federal Reserve bank for or with respect to such property.

Whenever (1) any insured bank has received any property from or for the account of a foreign state which

is recognized by the Government of the United States, or from or for the account of a central bank of any such foreign state, and hold such property in the name of such foreign state or such central bank; (2) a representative of such foreign state who is recognied by the Secretary of State as being the accredited representative of such foreign state to the Government of the United States has certified to the Secretary of State the name of a person as having authority to receive, control, or dispose of such property; and (3) the authority of such person to act with respect to such property is accepted and recognized by the Secretary of State, and so certified by the Secretary of State to such insured bank, the payment, transfer, delivery, or other disposal of such property by such bank to or upon the order of such person shall be conclusively presumed to be lawful and shall constitute a complete discharge and release of any liability of such bank for or with respect to such property. Any suit or other legal proceeding against any insured bank or any officer, director, or employee thereof, arising out of the receipt, possession, or disposition of any such property shall be deemed to arise under the laws of the United States and the district courts of the United States shall have exclusive jurisdiction thereof, regardless of the amount involved; and any such bank or any officer, director, or employee thereof which is a defendant in any such suit may, at any time before trial thereof, remove such suit from a State court into the district court of the United States for the proper district by following the procedure for the removal of causes otherwise provided by law.

Nothing in this section shall be deemed to repeal or to modify in any manner any of the provisions of the Gold Reserve Act of 1934, as amended, the Silver Purchase Act of 1934, as amended, or subdivision (b) of section 5 of the Act of October 6, 1917, as amended, or any actions, regulations, rules, orders or proclamations taken, promulgated, made, or issued pursuant to any of such statutes. In any case in which a license to act with

respect to any property referred to in this section is required under any of said statutes, regulations, rules, orders, or proclamations, notification to the Secretary of State by the proper Government officer or agency of the issuance of an appropriate license or that appropriate licenses will be issued on application shall be a prerequisite to any action by the Secretary of State pursuant to this section, and the action of the Secretary of State shall relate only to such property as is included in such notification. Each such notification shall include the terms and conditions of such license or licenses and a description of the property to which they relate.

For the purposes of this section, (1) the term"property" includes gold, silver, currency, credits, deposits, securities, choses in action, and any other form of property, the proceeds thereof, and any right, title, or interest therein; (2) the term "foreign state" includes any foreign government or any department, district, province, county, possession, or other similar governmental organization or subdivision of a foreign government, and any agency or instrumentality of any such foreign government or of any such organization or subdivision; (3) the term "central bank" includes any foreign bank or banker authorized to perform any one or more of the functions of a central bank; (4) the term "person" includes any individual, or any corporation, partnership, association, or other similar organization; and (5) the term "insured bank" shall have the meaning given to it in section 12B of this act.

Regulation M: 12 C.F.R. §213.104 (1973-79); Statement Of Policy On Availability Of Information To Facilitate Supervision Of Foreign Operations Of Member Banks

For the guidance of member banks having foreign operations, the Board publishes the following statement of policy regarding availability of information pertaining to member banks' foreign branches and subsidiaries to enable proper supervision of those operations:

(a) The Board of Governors of the Federal Reserve System, as a central bank, is properly concerned with the preservation and promotion of a sound banking system in the United States. The Board of Governors and other Federal banking supervisory authorities have been given specific statutory responsibilities to assure that banking institutions are operated in a safe and prudent manner affording protection to depositors and providing adequate and efficient banking services to the public on a continuing basis. These responsibilities and concerns are shared by central banks and bank supervisors the world over.

(b) Under sections 25 and 25(a) of the Federal Reserve Act, the Board has particular responsibilities to supervise the international operations of member banks in the public interest. In carrying out these responsibilities, the Board has sought to assure that the international operations of member banks would not only foster the foreign commerce of the United States but that they would also be conducted so as not to encroach on the maintenance of a sound and effective banking structure in the United States. In keeping with the latter consideration, the Board believes it incumbent upon member banks to supervise and administer their foreign branches and subsidiaries in such a manner as to assure that their operations are conducted at all times in accordance

with high standards of banking and financial prudence.

(c) Proper administration and supervision of foreign branches and subsidiaries require the use of effective systems of records, controls, and reports that will keep the bank's management informed of the activities and condition of its branches and subsidiaries. At a minimum, such systems should provide the following:

(1) *Risk Assets*. To permit assessment of exposure to loss, information furnished or available to head office should be sufficient to permit periodic and systematic appraisals of the quality of loans and other extensions of credit. Coverage should extend to a substantial proportion of the risk assets in the branch or subsidiary, and include the status of all large credit lines and of credits to customers also borrowing from other offices of the bank. Information on credit extensions should include (i) a recent financial statement of the borrower and current information on his financial condition; (ii) credit terms, conditions, and collateral; (iii) data on any guarantors; (iv) payment history; and (v) status of corrective measures employed.

(2) *Liquidity*. To enable assessment of local management's ability to meet its obligations from available resources, reports should identify the general sources and character of the deposits borrowings, etc., employed in the branch or subsidiary with special reference to their terms and volatility. Information should be available on sources of liquidity — cash, balances with banks, marketable securities, and repayment flows — such as will reveal their accessibility in time and any risk elements involved.

(3) *Contingencies*. Data on the volume and nature of contingent items such as loan commitments and guaranties or their equivalents that permit analysis of potential risk exposure and liquidity requirements.

(4) *Controls*. Reports on the internal and external audits of the branch or subsidiary in sufficient detail to permit determination of conformance to auditing guidelines. Such reports should cover (i) verification and identification of entries on financial statements; (ii) income and expense accounts, including descriptions of significant chargeoffs and recoveries; (iii) operation of dual-control procedures and other internal controls; (iv) conformance to head office guidelines on loans, deposits, foreign exchange activities, proper accounting procedures, and discretionary authority of local management; (v) compliance with local laws and regulations; and (vi) compliance with applicable U.S. laws and regulations.

Regulation K: 12 C.F.R. §211.7 (1980); Supervision And Reporting

(a) *Supervision.*

(1) Investors shall supervise and administer their foreign branches and subsidiaries in such a manner as to ensure that their operations conform to high standards of banking and financial prudence. Effective systems of records, controls, and reports shall be maintained to keep management informed of their activities and condition. Such systems should provide, in particular, information on risk assets, liquidity management, and operations of controls and conformance to management policies. Reports on risk assets should be sufficient to permit an appraisal of credit quality and assessment of exposure to loss, and for this purpose provide full information on the condition of material borrowers. Reports on the operations of controls should include the internal and external audits of the branch or subsidiary.

(2) Investors shall maintain sufficient information with respect to joint ventures to keep informed of their activities and condition. Such information shall include audits and other reports on financial performance, risk exposure, management policies, and operations of controls. Complete information shall be maintained on all transactions with the joint venture by the investor and its affiliates.

(3) The reports and information specified in paragraphs (a)(1) and (2) of this section shall be made available to examiners of the appropriate bank supervisory agencies.

(b) *Examinations.* Examiners appointed by the Board shall examine each Edge Corporation once a year. An Edge Corporation shall make available to examiners

sufficient information to assess its condition and operations and the condition and activities of any organization whose shares it holds.

(c) *Reports.*

(1) Each Edge Corporation shall make at least two reports of condition annually to the Board at such times and in such form as the Board may prescribe. The Board may require that statements of condition or other reports be published or made available for public inspection.

(2) Edge Corporations, member banks, and bank holding companies shall file such reports on their foreign operations as the Board may require.

(3) A member bank, Edge Corporation or a bank holding company shall report within 30 days any acquisition or disposition of shares in a manner prescribed by the Board.

(d) *Filing Procedures.* Unless otherwise directed by the Board, applications, notifications, and reports required by this Part shall be filed with the Federal Reserve Bank of the district in which the parent bank or bank holding company is located, or if none, the Federal Reserve Bank of the district in which the applying or reporting institution is located. Instructions and forms for such applications, notifications and reports are available from the Federal Reserve Bank.

(e) *Transition.*

(1) Transactions that have been consummated or activities engaged in pursuant to the Board's general or specific consent prior to June 8, 1979, may be retained or continued. Conditions imposed or undertakings in connection with such investments that are inconsistent with this Part shall be superseded by this part.

(2) Extensions of credit in excess of the limitations of section 211.6(b) that were outstanding on June 8, 1979, may remain outstanding until the date of maturity.

(3) Edge Corporations whose accounts or investments do not conform to sections 211.6(d) or 211.5(b) of this Part on June 14, 1979, shall conform such accounts and investments by June 14, 1981.

Section 106 of Jamaican Registration of Titles Act

If such default in payment or in performance or observance of covenants, shall continue for one month after the service of such notice, or for such other period as may in such mortgage or charge be for that purpose fixed, the mortgagee or annuitant, or his transferees, may sell the land mortgaged or charged, or any part thereof, either altogether or in lots, by public auction or by private contract, and either at one or at several times and subject to such terms and conditions as may be deemed fit, and may buy in or vary or rescind any contract for sale, and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby, and may make and sign such transfers and do such acts and things as shall be necessary for effectuating any such sale, and no purchaser shall be bound to see or inquire whether such default as aforesaid shall have been made or have happened, or have happened, or have continued, or whether such notice as aforesaid shall have been served, or otherwise into the propriety or regularity of any such sale; and the Registrar upon production of a transfer made in professed exercise of the power of sale conferred by this Act or by the mortgage or charge shall not be concerned or required to make any of the inquiries aforesaid; and any persons damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy only in damages against the person exercising the power.

A-166

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-1845

ROSE HALL LIMITED,

Plaintiff-Appellant

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION and HOLIDAY INNS, INC.,

Defendants-Appellees

Appeal From A Final Judgment of the United States District Court for the District of Delaware

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BRIEF OF APPELLANT ROSE HALL LIMITED

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CMOBC's involvement in the deception of the Jamaican Court

The jury found in answer to Interrogatory 4 that Chase Jamaica, as a result of its control by CMOBC, deceived the Jamaican court into withholding an injunction of the sale of the Rose Hall collateral (p. 5, *supra*). The Opinion below overturned this, holding that such a deception has no legal significance because those involved in perpetrating it were protected by the rule that immunizes a witness from damage liability for perjury (1054-69a) (See pp. 23-31, *infra*).

Alternatively, the Opinion held that there was evidence to support the finding of deception (1069-74a), but that the record was "completely devoid" of evidence to support the jury's finding that it occurred "as a result of [Chase Jamaica's] control by CMOBC" (1074-80a) (See pp. 31-35, *infra*). In so ruling, the Opinion said the existence of "consultation up the ladder is pure speculation on plaintiff 's part" (1075). This was mistaken.

Giberga's "consultation up the ladder": In early October 1976, just after Rose Hall's Jamaican suit was filed, Giberga and Sigaretta traveled to Jamaica where they spent several days conferring about that litigation (3934a). Giberga wrote an October 15, 1976 memorandum about that trip to Morley, another New York subordinate of Mason (3934a). It explains that he had been in Jamaica "conferring extensively" about the case and that there were plans to confer further. With the memorandum Giberga forwarded the papers filed in the case up to that time. The memorandum concluded, "I'll talk to you early Monday . . . Please advise Tom Conigliaro [another New York subordinate of Mason] et al [Mason?] of this."

To support its statement that there was nevertheless no "consultation up the ladder," the Opinion refers to "uncontradicted testimony by Mason . . . that he never heard of the existence of the Jamaican lawsuit until questioned about it on his deposition in this action in 1981" (1073a).

Actually, Mason was not "uncontradicted" on this; he was well aware of the Jamaican litigation long before his 1981 deposition. Brown, CMOBC's main witness below, testified that he

did not communicate up the ladder as to statements about Rose Hall in an October 1976 credit audit of Chase Jamaica, for these reasons (2228-29a):

> A. . . . Because I knew that at that time *senior management in Chase were well aware of what had happened in Jamaica, and the fact that Rose Hall, Ltd., had taken injunction proceedings against us;* they were well *aware of all the developments*. And I didn't feel it necessary to go into a long review of that in response to the credit audit.
>
> Q. Senior management, you mean people like Mr. Mason? A. *Mr. Mason would be one*. Mr. Giberga, Mr. Morley, Mr. Conigliaro.

And, in early 1977, the draft agreement between Chase Jamaica and UDC for the sale of the Rose Hall collateral, or at least the indemnity clause of that agreement, was cleared in advance by Mason in New York, as Mason himself conceded (p. 17, *supra*). The exclusive subject of that indemnity clause was Chase Jamaica's obligation to indemnify UDC from any consequences of Rose Hall's Jamaican suit (4207a; 3885a; 3949a; 3523a). *See also* 5051a (Criticized Loan Report discussing Jamaican case) and 2788-90a (testimony showing Mason's review of such reports).*

The participation of Giberga and Sigaretta in the defense of the injunction proceedings: In holding there is no evidence of CMOBC's involvement in the deception of the Jamaican court, the Opinion not only says there was no "consultation up the ladder" but also that there was insufficient evidence "to support a finding that CMOBC indirectly controlled the fraud on the Jamaican court through CMOC" (1079a). Rose Hall had argued

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* Moreover, long before Mason's 1981 deposition CMOBC became deeply involved in the stay proceedings in the Jamaican lawsuit and proffered its conditional undertaking to satisfy a money judgment against Chase Jamaica (p. 5, *supra*). As the Jamaican Court of Appeals noted, "It was rather Chase [referring to CMOBC and not Chase Jamaica], a third party, who put up a resolute and spirited resistance [to the stay] . . . " (4251a). Since Mason was a CMOBC director, and CMOBC's chairman and president was his immediate boss, and Conigliaro, a CMOBC officer, was his subordinate, it may be inferred that he knew of this.

alternatively that CMOBC was liable because it had permitted its power to control Chase Jamaica to be exercised by CMOC, which was then functioning as CMOBC's deputy. The jury was instructed that "it would not matter whether CMOBC exercised control over Chase Jamaica directly by CMOBC itself, or indirectly by Chase Manhattan Bank, N.A., and/or CMOC" (3126a).

In any event, there was certainly evidence from which the jury could find that Giberga and Sigaretta were involved in the deception of the Jamaican court, both as direct subordinates of the CMOBC officials in New York and as employees of CMOBC's deputy, CMOC. Before the injunction hearings, Giberga and Sigaretta were "conferring extensively" in Jamaica about the defense of that case as reported in Giberga's October 15, 1976 memorandum to New York (3934a). Thereafter, during at least a part of the several days of injunction hearings held by the Jamaican court, Sigaretta was present (2700-01a).

In conferring about the defense, Giberga and Sigaretta not only met with Brown but also with Chase Jamaica's solicitor and with the two barristers whom the solicitor instructed in resisting the injunction (3934a; 1956-58a; 2166a; 2422-24a; 2445a). Potential defenses were discussed, including "the ability of Chase Jamaica to satisfy a judgment in damages" (2423a). The adequacy of damages became the first line of defense to the injunction (3960a; 3998a) and the specific subject of the deceit of the Jamaican court (pp. 4-6, *supra*).

The defensive submissions of the barristers: Despite Chase Jamaica's undercapitalized condition the barristers resisted the injunction and, as Chase Jamaica's barrister conceded below, "the gist of the presentation [to the Jamaican court was] that as to the defendant [Chase Jamaica], the situation was such that the court really ought not to entertain any doubt about its ongoing solvency" (2442a). Rose Hall's Jamaican barrister described Chase Jamaica's assertion (1612a):

> . . . *that the defendant was part of a great organization of bankers*, that its present revenue position was a temporary situation, that it intended to continue in business and its position would, in fact, improve, *that it would have the backing of its overseas parent company*, and that for this

> reason or for these reasons there was absolutely no danger of the plaintiff being faced with a position in which he could not recover damages.*

In the context of the admitted chain of command and centralized administrative control over Chase Jamaica, the inference is strong and natural that such representations would not be made unless authorized by CMOBC; subordinates in such a hierarchy do not ordinarily make representations about the future actions of their superiors, without appropriate clearance.**

Brown's deceptive testimony that there were no plans to shut down Chase Jamaica: Brown testified that, in preparing the defense of the Jamaican litigation, the question of plans for shutting down Chase Jamaica was anticipated, and when asked, Giberga said there were none (2163-64a). Although Giberga testified he could not remember such a conversation (1662a), he would not dispute that it took place (1959-60a; 1980-81a).

Giberga's communications with New York concerning the Jamaican litigation point to involvement "up the ladder" in the deception (pp. 18-19, *supra*). Mason was the only original source of information on plans to shut down Chase Jamaica, because he was the lowest ranking person in the Chase organization having authority to shut down such a subsidiary (2652a; 1590a; 2782a). By late 1976, when the defense of the Jamaican litigation was being prepared, Mason admittedly had such plans; he conceded that at the time "there was an intention to close

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* There were similar assertions at other times and for other purposes. Following the injunction hearings, Chase Jamaica's solicitor said in a letter to a representative of the Jamaican government that "the parent bank, as one would expect, has never in its history failed to stand behind a wholly owned subsidiary" (3535a; *see also* 1408-11a). Brown even testified below that, in order to satisfy a damage judgment, "Chase Jamaica would always have the resources to call to Chase Manhattan Bank to assist, if necessary . . . or to CMOBC . . . " (2168a). And CMOBC's president testified that it was his position CMOBC "would assist Chase of Jamaica in satisfying a [Rose Hall] judgment" (1407a). *See also* 4276a.

** Compare the Manuals' requirements for pre-clearing public statements (p. 11, *supra*).

Chase Jamaica if the environment in Jamaica did not change for the better" (2779a; 2772-78a).*

There was reason, however, for not disclosing those plans. Disclosure of the plans would obviously have a detrimental effect on the defense of the Jamaican litigation, and they were treated as confidential information, disclosure of which might also jeopardize Chase Jamaica's sale of the Rose Hall collateral in other ways (3518a; 2702-03a; 2781-82a).

Finally, there was ample additional foundation for concluding that Giberga knew of Mason's plans. Although Giberga could remember very little about these matters (Tr. 6496; Tr. 6541-43; 1958-60a; Tr. 6669; 1978a; 1981a; Tr. 6715-16), he conceded that, if plans had been made to close Chase Jamaica, he would have known about them (1961a). Giberga also said that, if he had known, he would have shared that information with his subordinate Sigaretta, and he did not know of any other source of such information to Sigaretta (1978-79a). On December 3, 1976, within days of the Jamaican injunction proceedings, Sigaretta wrote a "Private & Confidential" memorandum showing his awareness of "plans for the eventual closing" of Chase Jamaica and for stripping it of its "U.S. dollar portfolio" which would "be transferred to Chase New York" (3518a).

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* A January 5, 1978, "CMOBC FILE MEMO" about the closing of Chase Jamaica recited, "Decision to close office was made about a year and a half ago" (3551a) — i.e., around June, 1976, months before the Jamaican proceeding. *See also* 3518a; 3564a.

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2. The Jury's Finding In Answer To Interrogatory 4 That Chase Jamaica's Deception Of The Jamaican Court Occurred As A Result Of CMOBC's Control Did Not Lack Evidentiary Support.

In its alternative ruling the Opinion, as another basis for the grant of CMOBC's motion for judgment n.o.v. (1074-80a), held that even if Interrogatory 4 was not legally faulty, the jury's an-

swer was without effect because factually the evidence did not support the finding that Chase Jamaica deceived the Jamaican court "as a result of its control by CMOBC" (p. 5, *supra*). As a further alternative, if the judgment n.o.v. were reversed, the court below granted CMOBC a new trial on this issue, holding the jury decided it against the clear weight of the evidence (1087a).

The standard of review of this conditional grant of a new trial involves abuse of discretion as the ultimate criterion (*see* p. 42, *infra*). However, the discretion to grant a new trial on the ground that the verdict is against the weight of the evidence is narrow and subject to "closer scrutiny" than most forms of discretion; the trial judge (and, therefore, the reviewing court) is simply required "to decide whether sufficient evidence existed on the record which, if accepted by the jury, could sustain the verdict," because "any other standard would permit the trial court to substitute its judgment for that of the jury." *Hourston v. Harvlan, Inc.*, 457 F.2d 1105, 1107 (3d Cir. 1972).

In all events, if there was evidence to support the jury finding on control in answer to Interrogatory 4, so that it was error to grant CMOBC judgment n.o.v. on this ground, then there can be no valid reason to retry the control issue. Because of its nature — what elements of the Chase organization controlled the deception — almost all the evidence about the issue was admissions made by CMOBC witnesses or found in documents from the Chase organization. Hence, if that evidence shows CMOBC's control of the deception, weighing it against contrary self-serving generalities by CMOBC witnesses was a question of credibility for the jury, and even a judge who heard it firsthand would have no basis to supplant the jury's determination.

(a) The evidence that Chase Jamaica's deception of the Jamaican court occurred as a result of its control by CMOBC.

This evidence included quite simple, straightforward facts — that CMOBC assigned Brown to Jamaica; that it was involved in the payment of Brown's salary; that Brown was required to turn over his Chase Jamaica director's fees to CMOBC; that he regarded himself as "working for a very big bank" (p. 17, *supra*).

Insofar as the deception was founded upon the submissions

of the barristers, there were also simple bases for concluding that CMOBC was involved. If the barristers had no proper basis to say that Chase Jamaica "would have the backing of its overseas parent company," they were imposing on the Jamaican court in an outlandish way. CMOBC made no showing below that the barristers lacked authority to say it would provide such backing (to the contrary, *see* p. 21, n., *supra*). For certain purposes it is, of course, legally presumed that a lawyer is authorized to act by the party for whom he is purporting to act. *Bethlehem Steel Corporation v. Devers*, 389 F.2d 44, 45 (4th cir. 1968); 7 Am. Jur.2d, Attorneys At Law §142. A *fortiori* here, a jury must be permitted to infer that the barristers were authorized by the appropriate party to say what they did to the Jamaican court.

In all events, the evidence contains much more about the involvement of CMOBC in the deception of the Jamaican court. Giberga and his subordinate Sigaretta, as well as Brown, worked with the Jamaican lawyers in preparing the defense for the injunction hearings (pp. 19-20, *supra*). The adequacy of damages and the question of plans to shut down Chase Jamaica were discussed (p. 20, *supra*).

Giberga communicated about the case with the New York staff of his boss, Mason — with whom he also regularly communicated about Chase Jamaica (p. 15, *supra*). Mason had no official position with Chase Jamaica (p. 12, *supra*). However, he was involved with CMOBC (p. 12, *supra*), and indeed CMOBC was the "linkage providing [him] with a chain of command to Chase Jamaica" (p. 15, *supra*). Brown testified that the persons up Chase Jamaica's chain of command — Giberga, Morley, Conigliaro, and Mason — "were well aware of all the developments" in the Jamaican litigation (p. 19, *supra*).

After the communication with New York, Giberga's subordinate Sigaretta returned to Jamaica to be present for the injunction hearings (pp. 19-20, *supra*). And in those proceedings the court was told that Chase Jamaica "would have the backing" of CMOBC, "not to entertain any doubt about its ongoing solvency," and that no plans existed to close Chase Jamaica down (pp. 20-22, *supra*).

Whether Chase Jamaica would have the CMOBC backing that was indispensable to ongoing solvency in the event of a Rose Hall judgment was obviously dependent upon CMOBC, and could properly be determined only from persons who could speak for it. CMOBC's management were the leaders of the New York group which Giberga contacted about the Jamaican litigation (pp. 18-19, *supra*). Furthermore, any shut down of Chase Jamaica was something only Mason could decide, as Giberga knew (p. 21, *supra*).

None of this was seriously disputed. And from this, the jury was certainly permitted to infer that, when Giberga communicated with New York, he obtained advice from CMOBC on these specific topics for purposes of the litigation. There is even direct evidence from Sigaretta's memorandum of December 3, 1976, confirming that the undisclosed plans to close Chase Jamaica had indeed been passed down the chain of command (p. 22, *supra*).

Although Mason testified that he did not even know of the Jamaican litigation until 1981 (p. 18, *supra*), this could fairly be rejected as a lie (pp. 18-19, *supra*). The persons named in Giberga's memorandum to New York about the litigation were Morley and Conigliaro (p. 18, *supra*); both worked for Mason, and Conigliaro was a CMOBC officer (p. 13, *supra*). Morley and Conigliaro were both still employed in the Chase organization at the time of trial below (478a; 2707-09a). CMOBC called as witnesses people from all over that organization. The jury was specifically instructed that it could draw an inference from the failure to call such persons as witnesses (3103a). There was such a failure — neither Morley nor Conigliaro were called to testify.

(b) The law on the sufficiency of the evidence to support the jury's verdict.

In *Kresky v. Magid*, 716 F.2d 206, 211 (3rd Cir. 1983), this Court noted that a jury verdict questioned by a motion for judgment n.o.v. is subject to "the narrowest review available" and explained at p. 209, "[i]n considering a motion for judgment n.o.v, the court must expose the evidence to the strongest light favorable to the party against whom the motion is made and give him the advantage of every fair and reasonable inference."

Kresky also shows that the jury here was fully justified in finding from the evidence that Chase Jamaica's deception of the Jamaican court was perpetrated as a result of the control by CMOBC. Other instructive cases of this Court have approved jury inferences on far less concrete evidence than present here. *E.g., Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982)); *Kerry Coal Company v. United Mine Workers*, 637 F.2d 957 (3d Cir.), *cert. denied*, 454 U.S. 823 (1981)); *Virgin Islands Labor Union v. Caribe Construction Company*, 343 F.2d 364, 368 (3d Cir. 1965). *See also House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 66 (5th Cir. 1972); *Edgar v. Fred Jones Lincoln-Mercury*, 524 F.2d 162, 167 (10th Cir. 1975); *Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634 (8th Cir. 1975); *Valley View Cattle Co. v. Iowa Beef Processors, Inc.*, 548 F.2d 1219 (3d Cir. 1977).

Supreme Court cases also recognize the propriety of jury verdicts such as that reached here. *See, e.g., Schulz v. Pennsylvania Railroad Co.*, 350 U.S. 523, 526 (1955); *Lavender v. Kurn*, 327 U.S. 645, 653 (1945). In *Lavender*, for example, the Court said:

> It is no answer to say that the jury's verdict involved speculation and conjecture. . . . Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

Here, we submit, such precedent requires a reversal of the post-trial ruling below and reinstatement of the jury's verdict, which is amply supported by evidence in all respects.

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A-177

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-1845
No. 83-1865
No. 83-1866

ROSE HALL LIMITED,
Appellant/Cross-Appellee

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION and HOLIDAY INNS, INC.,
Appellees/Cross-Appellants

Appeal From A Final Judgment of the United States District Court for the District of Delaware

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RESPONSE BRIEF OF ROSE HALL LIMITED

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(c) CMOBC's disregard of the evidence "linking" it to the barristers' submissions (CMOBC Br. 24-25).

CMOBC says there was no evidence "linking" it to the submissions (CMOBC Br. 25). The record shows otherwise.

(i) *The barristers' submissions in themselves permitted the inference of linkage* (RH Br. 33): CMOBC offers no answer to this at all, except to deny it. Implicit in the barristers' statement that Chase Jamaica would have the backing of its parent company was a representation that CMOBC had authorized such a statement. If not, the statement would be not merely misleading, but dishonest.*

Fundamental evidentiary presumptions show that the linkage to CMOBC can be inferred from the barristers' statement alone. For example, "[t]he law presumes in favor of integrity of conduct"; "there is also a presumption of regularity of acts in the transaction of private business, it being presumed in this respect that a person has performed a duty enjoined upon him by law or by contract unless the contrary appears." 29 Am.Jur.2d *Evidence* §168 at 208-10 (1967); *accord*, 31A C.J.S *Evidence* §§126, 139 (1964). The court charged the jury to this effect (Tr. 15,496).

* CMOBC tries to distinguish Rose Hall's point that "[f]or certain purposes it is, of course, legally presumed that a lawyer is authorized to act" (RH Br. 33), saying this applies only to "a lawyer's formal entry of appearance on behalf of a party" (CMOBC Br. 25). This misses the point. Rose Hall did not say the presumption itself applies here, but cited it as an analogy from which it follows that "*a fortiori* here, a jury must be permitted to infer that the barristers were authorized . . . ." (RH Br. 33).

In addition, evidence of an act (the barristers' assurance of CMOBC's backing) is evidence from which earlier acts that are legal prerequisites (obtaining CMOBC's authority) can be inferred. 29 Am.Jur.2d *Evidence* §168 at 210 (1967). Hence, in *American Railway Express Co. v. Lindenburg*, 260 U.S. 584, 589 (1923), the Court said:

> It is a rule of general application that "where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act."

Indeed, the Jamaican court accepted the barristers' submissions as meaningful, and hence as authorized, in making a serious decision about an important matter. CMOBC does not explain why the jury could not do the same. Inevitably, it is saying this Court should deny the probability that a lawyer's representation before a judicial tribunal is made with the authority necessary for it to be meaningful.

(ii) *The surrounding circumstances reinforced the inference linking the barristers' submissions to CMOBC*: In early October 1976, soon after Rose Hall filed the injunction suit, Giberga and his subordinate, Sigarreta, visited Jamaica and had extensive discussions about defending the suit, involving Brown, Judah and the barristers (RH Br. 20). The adequacy of damages was discussed and ultimately became Chase Jamaica's first line of defense (RH Br. 20). Chase Jamaica's ability to respond to a Rose Hall judgment, which was critical to the adequacy of damages, was also discussed (RH Br. 20). Because of its minimal net worth, Chase Jamaica obviously could not respond unless it were so managed as not to pay off the millions in "debt" owed to Chase entities or was otherwise backed financially (p. 9, *supra*).

After the Jamaican discussions, Giberga wrote his memorandum of October 15 (a Friday) to Morley in New York, referring to those discussions, forwarding papers from the lawsuit, asking that Conigliaro "et al" be advised, and saying he would "talk to you early Monday" (RH Br. 18). Morley and Conigliaro, a CMOBC officer (RH Br. 13), both worked for Mason who worked for Stankard (RH Br. 12, 2746-47a, 2757a), the board chairman and president of CMOBC (2645a). Stankard, Mason,

Morley and Conigliaro all worked in the New York offices where CMOBC was then located (CMOBC Br. 21, 2306a, 2746-47a, 2757a). Giberga's assistant, Sigaretta, later returned to Jamaica for the injunction hearing, where the barristers told the court Chase Jamaica would have CMOBC's financial backing (RH Br. 20-21).

CMOBC does not explain why, in these circumstances, the jury could not conclude it was more likely than not that Giberga's planned conversation with New York occurred and cleared the barristers' submissions about CMOBC's backing. The unlikely thing, in discussing the suit with the higher headquarters where CMOBC was located, would be to omit mention of the critical defensive element — the need for financial backing for Chase Jamaica — when talking to persons in the office of the most logical source of the backing — the parent company, CMOBC. In fact, nowhere does CMOBC's brief here actually deny there was clearance.

(iii) *Under all the circumstances, the inference of linkage was compelling*: In Chase Jamaica's sale of the Rose Hall collateral to UDC, it gave UDC a limited indemnity against liabilities arising out of Rose Hall's Jamaican lawsuit for which Mason's approval was obtained (RH Br. 17, 19). It is surely reasonable to think there was similar or higher approval for the barristers' submissions that Chase Jamaica's parent company would provide unlimited backing to satisfy a Rose Hall damage award.

In the stay proceedings in the Jamaican action, when there was a need to demonstrate the financial backing for Chase Jamaica, it was CMOBC which came forward purportedly to supply the backing, albeit on a basis the court found "worthless" (p. 10, *supra*). This surely supports the inference that CMOBC had cleared the basic assurance about backing in the first place.

Finally, when CMOBC presented its case below, Barnett had already testified about the barristers' assurance of parent company backing. CMOBC then called its chairman and president, Stankard. While he broadly testified that he was not involved in the Jamaican litigation, neither he nor any other CMOBC witness testified that the barristers had no authority from CMOBC to make the assurance about backing. "Here the rule may be invoked that the failure of a party to introduce evidence within his possession gives rise to the presumption that, if

produced, it will be unfavorable to him," *Hoffman v. C.I.R.*, 298 F.2d 784, 788 (3d Cir. 1962).

Thus, the inference "linking" the barristers' submissions to CMOBC does not require any "inferential leap" of the kind allowed in *Kresky v. Magid*, 716 F.2d 206, 211 (3d Cir. 1983) (RH Br. 34-35). It follows as naturally and readily as inference ever does.*

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* Courts routinely accept important inferences from circumstantial evidence less compelling than the inference here. One example is the inference permitting a fire insurer's defense of arson to be submitted to a jury. *Cora Pub., Inc. v. Continental Casualty Co.*, 619 F.2d 482, 485 (5th Cir. 1980) (In numerous "cases where sufficient motive and opportunity of the insured to commit arson were combined with proof of an incendiary cause of fire, this court and others have considered the arson defense to be supportable by inference"). Another is the inference of receipt of taxable income "beyond a reasonable doubt" from increases in net worth and the existence of a possible source from which receipts would be taxable, despite the possibility of non-taxable sources. *Holland v. United States*, 348 U.S 121, 137-38 (1954).

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3. The Evidence Fully Supports The Finding That CMOBC Was Involved In The Deception Of The Jamaican Court (CMOBC Br. 18-26).

(a) CMOBC's arguments about the direct evidence (CMOBC Br. 18-20).

CMOBC says "uncontradicted direct evidence established that CMOBC had only minimal involvement in the affairs of Chase Jamaica," limited to "collecting dividends," "accumulating financial information," and "sometimes making additional investments" (CMOBC Br. 18). This generality wholly ignores the legal obligation of Edge companies like CMOBC to "super-

vise and administer their foreign . . . subsidiaries" in "their operations" (RH Br. 10). Furthermore, CMOBC's assertion of "minimal involvement" also overlooks all kinds of contrary evidence from its own witnesses and Chase organization documents — that CMOBC was "the linkage" to Chase Jamaica (RH Br. 15); that there was a chain of command which utilized that linkage (RH Br. 10-15); that as a result of the linkage, detailed manuals promulgated up the chain of command regulated the affairs of Chase Jamaica (RH Br. 10-11); that CMOBC assigned Brown to Jamaica,* was involved in the payment of his salary, and received any director fees Chase Jamaica paid him (RH Br. 17); and that Mason, who had no official position with Chase Jamaica but worked for Stankard (RH Br. 12), "made the decision for Chase Jamaica" to scale down its operations (RH Br. 14).

CMOBC nonetheless continues in this vein, saying the "uncontradicted direct evidence established that CMOBC did not (1) participate in the administration of Chase Jamaica's loans and specifically the loan to plaintiff," nor "(2) maintain any files," nor "(3) discuss any of Chase Jamaica's loans" (CMOBC Br. 18-19). Actually, the Chase organization had an elaborate system for reporting and considering problem loans such as Rose Hall's up the chain of command (RH Br. 15). Thus criticized loan reports on the Rose Hall loan were prepared January 6, 1976 (3412-14a), March 31, 1976 (3415-16a), June 30, 1976 (3576a), September 30, 1976 (PX 780), and March 10, 1977 (3050-51a). Once a loan became criticized, it was "normal or routine that Mr Mason should keep an eye on the details of that loan" (2354a). Criticized loans of the size of Rose Hall's also received "substantial review" by the International Loan Committee, whose membership included Mason, Stankard and Conigliaro (2683-86a, 2738-39a), each of whom held a position with CMOBC (RH Br. 12-13). Indeed, "the officers and directors of CMOBC and the International Loan Committee very substantially overlapped" (2685-86a).

CMOBC next says, "every single witness who had any connection with CMOBC or Chase Jamaica was uncontroverted on the point that CMOBC had no involvement whatsoever with the Jamaican injunction proceeding" (CMOBC Br. 19). But the testimony CMOBC cites consists of generalizations so broad as to

* Prior to his assignment with Chase Jamaica, Brown, an Englishman, had held other international posts in the Chase organization.

be meaningless, and statements that were effectively controverted. Two illustrations seem apt.

The first testimony CMOBC cites, by Stankard, denies CMOBC's direction or control of the "major policy decisions and implementing actions of Chase Jamaica with respect to the administration of the Rose Hall, Ltd, loan" (2647-49a). But when Stankard was then asked, "who would have been or where would the decisions have been made concerning the administration of the Rose Hall, Ltd., loan" (2649a), he ultimately answered, "Well, the Board of Directors and the Chief Executive Officer of Chase Jamaica,* depending on the size of the loan; I don't recall what amounts went from where in those days. It would have gone from there up." (2650a). When asked, "There up where", he answered that, if it involved as much as the Rose Hall loan did, "it would come to New York" where Mason "had the responsibility for it" (2650a).

CMOBC's next witness who gave "uncontroverted" testimony that it had no involvement in the Jamaican lawsuit is Mason (CMOBC Br. 19). The testimony cited involves Mason's denial that he had learned of the existence of the Jamaican suit in 1976-78 (2780a). That testimony of Mason, however, was abundantly contradicted by Brown's direct testimony (RH Br. 18-19); by the March 10, 1977 criticized loan report discussing the Jamaican litigation (5050-51a) (a type of report Mason routinely reviewed, 2354a, Tr. 11, 615-21); and by a 1977 memorandum which showed that Mason approved provisions in the agreement for the sale of the Rose Hall collateral to UDC having the sole function of indemnifying UDC against claims in Rose Hall's Jamaican lawsuit (RH Br. 18-19).

(b) CMOBC's arguments about the circumstantial evidence (CMOBC Br. 20-26).

CMOBC says "plaintiff has admitted there is no direct evidence to support the jury's answer to Interrogatory 4 (999a; Dkt. 871 at 68)" (CMOBC Br. 20), and the Opinion below said,

* But Chase Jamaica's board of directors did not meet during the eighteen months spanning the events here involved (RH Br. 13, p. 25, *infra*). Furthermore, Chase Jamaica's chief executive officer, Brown, had had his loan authority completely withdrawn, which also deprived him of any authority to deal with a criticized loan such as Rose Hall's (RH Br. 16).

"Plaintiff concedes that 'there is no direct testimony' linking CMOBC with the events occurring in the Jamaican court (Dkt. 868, p. 39)" (1074a). Those statements describe the concession with mistaken breadth.*

There was direct evidence "linking" CMOBC with events in the Jamaican court. Evidence showed that CMOBC paid Brown's salary when he worked at Chase Jamaica** (RH Br. 17). Although CMOBC characterizes this as "totally irrelevant" to the control issue (CMOBC Br. 25), and the Opinion says it involves "novel argument" (1079a), an individual is ordinarily "linked" to a company that pays his salary. And, of course, it was Brown whose Jamaican testimony was so material.

In all events, abundant circumstantial evidence links CMOBC with the events in the Jamaican court. The evidence specifically linking the barristers' submissions to CMOBC has previously been reviewed (pp. 11-14, *supra*). CMOBC's arguments about other evidence will be reviewed here largely in the same order as in CMOBC's brief.

(i) *"The 'Chain Of Command' Over Chase Jamaica" (CMOBC Br. 20-21)*: CMOBC concedes Chase Jamaica was under command from the outside and that the chain of command to Mason and Stankard reflected "the actual reporting relationships" (CMOBC Br. 21 n.*).

CMOBC nonetheless says, "Such a structure . . . is not probative that CMOBC controlled Chase Jamaica's" deception (CMOBC Br. 21). CMOBC does not explain why such a chain of command would exist, if not for control. And CMOBC surely cannot mean it was not involved: Mason conceded CMOBC is

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* CMOBC and the Opinion cite Rose Hall's much narrower statement: "Actually, while there is no direct testimony, the circumstantial evidence powerfully shows that the relevant aspect of Chase Jamaica's defense before Justice Rowe must have been ultimately determined by Francis Mason, a CMOBC director" (999a). CMOBC also cites a concession of Rose Hall's counsel that no direct testimony or document said "that Giberga called Mason"; however, counsel pointed out "that the jury had every right to find it on the basis of the circumstantial evidence" (Dkt. 871 at 68).

** CMOBC questions the quality of this evidence (CMOBC Br. 26). It comes from a letter Brown himself wrote, mentioning "the gross amount that C.M.O.B.C are paying to Mr. Liberatore [another Chase Jamaica employee] and myself" (3568a). Brown's attempt to explain this was a prepared presentation (with chart) over five pages of transcript (2146-50a), but it did not explain away CMOBC's involvement (2152-53a).

"the linkage" to Chase Jamaica which makes the chain of command work (RH Br. 15). And as CMOBC acknowledges, "[a]t the top is Mr. Stankard" (CMOBC Br. 21), who was, *inter alia*, CMOBC's chairman and president (RH Br. 12).*

(ii) *"CMOBC's Position In The Chain Of Command" (CMOBC Br. 21):* CMOBC in effect concedes "that Mr. Mason had 'overall supervision of Chase Jamaica' ", though he had no official position with it (CMOBC Br. 21). CMOBC then says, "The source of Mr. Mason's authority with respect to Chase Jamaica was his position with Chase NY" (CMOBC Br. 22).

This can be read to acknowledge the propriety of piercing the corporate veil, but to say the defendant should have been Chase rather than CMOBC.** Of course, the ultimate source of authority was Chase, as the top company in the tier. However, intermediate companies like CMOBC had roles.*** Chase certainly could not give Mason authority to supervise Chase Jamaica if, for instance, it were owned by a Citibank subsidiary rather than CMOBC — CMOBC was "the linkage" (RH Br. 15).****

(iii) *"Chase Jamaica's Board Of Directors" (CMOBC Br. 22-23):* CMOBC asserts that "Chase Jamaica was governed at all

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* CMOBC says such a chain of command is "commonplace in large affiliated multi-national corporations" (CMOBC Br. 21). If so, perhaps such corporations commonly back their wholly owned subsidiaries. CMOBC cites no other instance where collection of adjudicated damages was evaded because such a corporation emptied a subsidiary in the face of suit, at least after injunctive relief for the creditor was defeated on the ground damages would provide an adequate remedy against the subsidiary. As Chase Jamaica's own solicitor said, "the parent bank, *as one would expect*, has never in its history failed to stand behind a wholly owned subsidiary" (RH Br. 21 n.*).

** If that is the argument, it contains some of the qualities of a shell game. Had Rose Hall sued Chase, the argument would surely have been that it should have sued Chase Jamaica's parent, or CMOC.

*** In *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 422-23 (5th Cir. 1980), it was held that a subsidiary could be liable for its parent's obligations.

**** In the final passage of this section, CMOBC quotes *Berger v. Columbia Broadcasting System, Inc.*, 453 F.2d 991, 995, 997 (5th Cir.), *cert. denied*, 409 U.S 848 (1972), where plaintiff sought to enforce against a parent a contract entered with its subsidiary. However, the court there merely said "a parent's potential to dominate its subsidiary" does not itself permit piercing. As to evidence that an employee of the subsidiary "answers" to an official of the

pertinent times by Messrs. Brown, Giberga, Morley and Conigliaro, *acting as members of Chase Jamaica's Board of Directors and Executive Committee*, and by Mr. Sigaretta acting first as 'advisor to Chase Jamaica' under the CMOC contract and thereafter as a Chase Jamaica director" (emphasis is CMOBC's) (CMOBC 22-23).

But during the "pertinent times" here, from March 9, 1976, to November 4, 1977, the Chase Jamaica board of directors did not meet (RH Br. 13).* Although CMOBC also refers to governance by the board's "Executive Committee", no evidence shows this committee met after March 12, 1976, when Chase Jamaica received legal advice "that Minutes must be prepared" for any such meeting (3882a).**

The evidence does not show that the Chase Jamaica board functioned on any material event of relevance here that does not also involve Mason up the chain of command. It was Mason, for example, who was involved in each of the following Chase Jamaica affairs — withdrawal of Brown's lending authority (on which the board acted at Mason's direction) (RH Br. 16); the

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parent, the court said "all of this 'answering' is insignificant," not because it was irrelevant to domination, but only because the evidence related "to the present-day relationships" rather than "the period in which the transaction" at issue occurred.

* The evidence shows, moreover, a general perception that, when they functioned as to Chase Jamaica, Giberga, Morley and Conigliaro did so in their offices with Chase companies up the chain of command and not as Chase Jamaica board members. When Brown wrote to Giberga, he often did not address him as the chairman of the board of directors of Chase Jamaica but, rather, as in Brown's July 12, 1976 memorandum about the Rose Hall $13 million hotel sale, as "VP CMOC, Miami" (3429a), or as in his July 29, 1976 memorandum concerning Holiday Inns' interference, simply "VP," noting a copy for Morley as "VP" (3433a). And when Giberga wrote his memorandum of October 15, 1976 to Morley in New York concerning the Jamaican litigation, he did not address him as a Chase Jamaica director but as "Vice President CMB-New York," referring to Morley's capacity as a Chase vice president (3934a). *See* RH Br. 13-14.

** Nothing indicates Jamaican law differs from the general American rule that actions of boards or board committees requires unanimous written consents (of which there are none here) or meetings or telephone conferences upon due notice to all members with a quorum's participation (of which there are none at relevant times). *See 2 Fletcher Cyclopedia Corporations* §§392-93 (1982).

regular review throughout 1976 of the Rose Hall loan through the criticized loan reports (pp. 21-22, *supra*); the decision to close Chase Jamaica, at least if matters did not improve (RH Br. 21-22); and the approval of Chase Jamaica's indemnity provision for UDC in the Rose Hall collateral sale (RH Br. 17, 19).

As Giberga said, "I kept my boss, Mr. Mason, advised of what went on in the Caribbean, including Jamaica" (RH Br. 14). As Brown said, Mason was "well aware of all the developments" in Rose Hall's Jamaican case (RH Br. 19).*

(iv) *"Giberga's 'Consultation Up The Ladder' " (CMOBC Br. 23-24):* As to the barristers' submissions, CMOBC's arguments here have been answered (pp. 12-13, *supra*). Beyond that, CMOBC attacks as "guesswork" the conclusion that, in connection with the injunction suit, there was "consultation up the ladder" about plans to close Chase Jamaica (CMOBC Br. 23-24). The evidence, however, clearly supports that conclusion of the jury.

In the early October discussions about defending that suit on the ground of adequacy of damages (p. 12, *supra*), the question whether Chase Jamaica would close was anticipated (RH Br. 21), and Chase Jamaica's lawyers asked Brown about this (2164a). Brown testified that he in turn asked Giberga whether there were such plans (2164a). Only Mason had authority to make a decision about shutting down a subsidiary (RH Br. 21), and Giberga regularly reported to Mason (RH Br. 12-13, 15). An inference of consultation up the chain of command could, of course, be properly based upon those facts alone, but there was more.

Giberga's October 15 memorandum to Morley in New York, asking that "Conigliaro *et al*" be informed and explaining his plans to "talk to you early Monday" (RH Br. 18, pp. 12-13, *supra*),** shows specific plans to consult up the ladder about the

---

* Finally, CMOBC cites *Fisser v. International Bank*, 282 F.2d 231, 238 (2d Cir. 1960) (CMOBC Br. 23), which held there could not be piercing "merely because [the subsidiary] elected the [parent's] officers to be its officers. . . ." That, of course, is not the basis for piercing here.

** CMOBC says Rose Hall never asked Giberga about his October 15 memorandum (CMOBC Br. 23 n.*). Giberga disclaimed any memory of whether Brown even brought up the subject of closing Chase Jamaica (1960a, 1980-81a). There was hardly reason to quiz him about his consultation up the ladder on a subject he claimed not to remember at all.

lawsuit. Furthermore, those with whom there were plans to consult worked for Mason who was the man with the answer to the question about plans to close.*

Mason did have plans to close Chase Jamaica if conditions did not improve, as he conceded (2779a, 2772-78a). Giberga testified he thought he would have known if there were such plans (RH Br. 22). Moreover, Giberga conceded that, if he had learned of plans to close, he would have shared that information with Sigaretta, his subordinate (RH Br. 22). Sigaretta returned to Jamaica for the injunction hearings in late November (2700-01a). On December 3, 1976 he wrote his "Private & Confidential" memorandum outlining the plans to close (RH Br. 22).

Precisely what went on among Giberga, Sigarreta, and Brown does not matter. The first two in effect testified they could not remember (1958-60a, 1978a, 1981a, 2701a, Tr. 6496, Tr. 6541-43, Tr. 6669, Tr. 6715-16). Brown testified Giberga told him there were no plans to close (2163-64a). Rose Hall maintains that Brown knew of the plans and that his testimony did involve perjury (pp. 43-47, *infra*), but even if Brown had been kept in the dark, that would simply confine the deception to a higher level. The present point is that there is evidence of consultation up the ladder and word back down the ladder which amply supports the verdict.

(v) *"The Chase Manuals" (CMOBC Br. 24)*: CMOBC disputes that "these manuals could somehow be attributed to" it (CMOBC Br. 24). However, it overlooks the substantial evidence that CMOBC mandated its subsidiaries' compliance with the manuals (RH Br. 11).

CMOBC also says the manuals "were only general policy statements, neither intended nor sufficient to govern day-to-day operations" (CMOBC Br. 24). However, the manuals governed matters within subsidiaries such as what individuals had what lending authority, where certain papers should be filed, the salary and vacation of the subsidiary's senior officer, etc. (RH Br. 11). Obviously, the manuals were an important instrument in controlling the affairs of subsidiaries from the outside, up the chain of command.

---

* CMOBC says Rose Hall could have elicited testimony of Morley or Conigliaro about "consultation up the ladder" (CMOBC Br. 23 n.***), but a party's failure to call or quiz a hostile witness can hardly be used against him.

(vi) *Conclusion (CMOBC Br. 24-26):** CMOBC's other points about the evidence on "linkage" have been addressed elsewhere. See pp. 11-14, *supra*.

The evidence on linkage (control) shows, we submit, that the court below erred in granting CMOBC judgment n.o.v. on the ground the jury improperly found control by CMOBC in answer to Interrogatory 4 of the verdict and also in alternatively granting CMOBC a new trial on that subject, as provided in paragraph 4 of the judgment (1160a).

[Text Deleted]

* CMOBC refers here to Rose Hall's argument concerning Chase Jamaica's "undercapitalization" (CMOBC Br. 25) but misunderstands what Rose Hall means (RH Br. 17-18). The point is that Chase Jamaica's undercapitalization in 1976 left it without material net worth. Hence, it obviously could not respond to a Rose Hall judgment unless supported from the outside. See pp. 9, 12, *supra*.

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A-191

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-1845
No. 83-1865
No. 83-1866

ROSE HALL LIMITED,

Plaintiff/Appellant

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION AND HOLIDAY INNS, INC.,

Defendants/Appellees

PETITION OF PLAINTIFF-APPELLANT ROSE HALL LIMITED FOR REHEARING UNDER F.R.A.P. 40 AND REHEARING EN BANC UNDER F.R.A.P. 35

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[Text Deleted]

IV. THE JURY PROPERLY FOUND THAT CMOBC CAUSED THE DECEPTION OF THE JAMAICAN COURT (RH Br. 18-22, 31-25; RH Resp. Br. 20-28).

The Opinion upheld the finding that Chase Jamaica deceived the Jamaican court, but rejected the jury's finding that CMOBC caused this (Op. 137-41). Suppose, hypothetically, that A, a senior executive in a publicly held company, receives on Monday confidential good news, highly material to the value of the company's stock, which news is not publicly disclosed until Friday. Suppose that A's son, B, who lives on the other side of the country, heavily buys the stock that week — having never previously done so. Suppose calls between A's office and B's office are fairly frequent, and a telephone bill shows one on Monday. Both A and B deny that A told B the news. Rose Hall submits that a jury could find to the contrary, beyond a reasonable doubt. As the cited parts of Rose Hall's briefs show, this hypothetical is a fair analogy; the jury here had every right to find by a preponderance that CMOBC caused the deception of the Jamaican court.

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(3)

No. 84-760

Office - Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1984

ROSE HALL LIMITED,

Petitioner,

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION AND APPENDIX

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HHPP

QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 34.2, respondent Chase Manhattan Overseas Banking Corporation ("CMOBC") here restates the questions presented which are inaccurately stated in the petition of Rose Hall Limited for a writ of certiorari (P i-ii).*

The first two questions stated in the petition are *not* properly presented to this Court because they were abandoned in the courts below. If those two questions had been preserved for presentation to this Court, they would properly be framed as follows:

> 1. Do the provisions of the Federal Reserve Act, 12 U.S.C. §§601-32, and related regulations render an Edge corporation organized under those provisions automatically liable as a matter of law for wrongs committed by its wholly-owned subsidiary?
>
> 2. Is petitioner entitled to judgment on the theory that CMOBC fraudulently "stripped" its subsidiary of assets where there was no evidence that CMOBC controlled the alleged "stripping" and the courts below determined as a factual matter that CMOBC never received anything of value from its subsidiary?

The petition misleadingly presents the third question — whether plaintiff may base its cause of action against CMOBC upon an alleged misrepresentation in a Jamaican tribunal — as one of federal law. Petitioner conceded in the Court of Appeals that the point is controlled by *Jamaican* law. Even if the Court were to decide this Jamaican law question in favor of petitioner, the result would not change

* Throughout this response, the petition for a writ of certiorari is cited as "P___," petitioner's appendix is cited as "A___," CMOBC's appendix is cited as "B___," and the joint appendix filed below in the Court of Appeals is cited as "___a." References to "PX___" and "DXC___" are to the trial exhibits of plaintiff and CMOBC, respectively, references to "TR___" are to the trial transcript below, and references to "Dkt. ___" are to the District Court docket.

because the judgment below also rests upon an independent factual ground — the absence of any evidence that CMOBC controlled the asserted fraud on the Jamaican court. Thus, the question presented is properly framed as follows:

> 3. (a) May a civil action for damages under Jamaican law be based upon alleged perjury in a prior judicial proceeding?
>
> (b) If so, under the facts of this case, did CMOBC control the alleged fraud in the prior proceeding?

Finally, the judgment at issue is supported by grounds independent of those relied upon by the courts below. The judgment must be affirmed if either of the following questions is answered in the negative:

> 4. Did petitioner's evidence of fraud, which was found by the District Court to be "scarce and contradictory," amount to clear and convincing proof sufficient to establish fraud under Jamaican law?
>
> 5. Under Jamaican law, does a secured creditor's duty of good faith require it to delay or forego sale of collateral upon the borrower's default in order (a) to assist the borrower to embark on major litigation against a third party and (b) to subdivide and develop land that the borrower had mortgaged as a whole?

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RULE 28.1 LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES

Chase Manhattan Overseas Banking Corporation is wholly owned by The Chase Manhattan Bank, N.A., which in turn is wholly owned by The Chase Manhattan Corporation. The following is a list of the subsidiaries (except wholly owned subsidiaries) and affiliates of each of them:

Diamond Lease Company Ltd.
AOI Lease Co., Ltd.
Chiyoda Lease Co., Ltd.
Dai Shi Lease Co., Ltd.
Kitakanto Lease Co., Ltd.
Meiko Enterprise Co. Ltd.
Minami Kyushu Diamond Lease Co. Ltd.
MTBC Leasing Co., Ltd.
Nagano Lease Co., Ltd.
Nihon Dental Lease, K.K.
Ohita Lease Co., Ltd.
114 Lease Co., Ltd.
77 Lease Co., Ltd.
Sime Diamond Lease (Singapore) PTE. Ltd.
Yamagata Diamond Lease Co., Ltd.
Union Provinciale Immobiliere, S.A.
Video Corporation of America
Purcoil (One) Limited
Purcoil (Two) Limited
Amanah Chase Merchant Bank Berhad
Arrendadora Cremi, S.A.
Banco de Investimentos Lar Brasileiro, S.A.
Banco del Comercio
Ahorramas Corporacion de Ahorro Y Vivienda
Almacenadora del Comercio De Depositos Generales, S.A.
Almacenera del Peru, S.A.

Banco Central Hipotecario
Corporacion Financiera De Caldas
Corporacion Financiera del Tolima
Acero Estructural del Tolima, Ltda.
Corporacion Forestal del Tolima, Ltda.
Corporacion Financiera Del Valle
Corporacion Grancolombiana De Ahorro Y Vivienda, S.A.
Banco Lar Brasileiro, S.A.
LMS Imoveis Limitada
Leasing Lar Brasileiro, S.A.
Institut de Reescompte Et De Garantie
Banque De Reescompte Et De Placement (B.A.R.E.P.)
Banque Ivoirienne de Developpement Industriel
Calabar Veneer & Plywood Ltd.
Caribbean Financial Services Corporation
Centrale de Livraison de Valeurs Mobilieres, (CEDEL) S.A.
Chase Manhattan Cameroon, S.A.
Chase Manhattan Bank (Austria), A.G.
Chase Merchant Bank Nigeria Limited
The Chase National Bank (Egypt), S.A.E.
Chase-N.B.A. Group Ltd.
Oceania Capital Corporation, Limited
Chase-N.B.A. Securities, Ltd.
Credit Guarantee Corporation — Malaysia Berhad
Cross River Mills Limited
Hong Kong Commodities Guarantee Corporation
The International Investment Corporation for Yugoslavia, S.A.
Inversiones Atlantida, S.A.
Arrendamiento Y Credito, S.A.
Atlantic Bank, Ltd.
Banco Atlantida, S.A.

Azucarera Central, S.A.
Compania Almacenadora, S.A.
Compania Azucarera Choluteca, S.A.
Compania Azucarera Yogoa, S.A.
Papeles Y Cartones, S.A.
Casa Propia Asociacion de Ahorro Y Prestamo, S.A.
Casa Y Terrenos, S.A.
Compania Almacenadora, S.A.
Fomento e Inversiones, S.A.
Hoteles De Honduras, S.A.
Publicitaria Tecnica Hondurena
Latin American Agribusiness Development Corporation
Libra Bank Limited
Manufacturera Latino-Americana, S.A.
Fabrica Nacional De Sacos, S.A.
Global Trading International Corporation, S.A.
Polisac, S.A.
Wilmington International Corporation
National Bank for Industrial and Touristic Development
National Investment Bank for Industrial Development, S.A.
Belgo-Factors N.V.
N.V. Internationaal Automatiserings Centrum
Groningse Maatschappij tot Stadherstel N.V.
Lease Plan Holding N.V.
B.V. Aannemersbedrijf Dubbers-Malden
Eurofestival B.V.
Grodex Karnavals — en Feestartikelen B.V.
Metaal-en Kunstofverw. Industrie Nautilus B.V.
Schuttevaerweg Holding B.V.
Stoffen Palet B.V.
Transmark Holding B.V.
Nederlandse Participatie Maatschappij, N.V.

Nieuw Rotterdam Beheer N.V.
Nieuw Rotterdam Læven N.V.
Maatschappij Doelenstraat B.V.
Nigerian Textile Mills, Ltd.
Octogonal Empreendimentos Ltda.
P.T. Chase Leasing Indonesia
Peruinvest — Compania de Fomento E Inversiones, S.A.
Private Export Funding Corporation
Saudi Investment Banking Corporation
Societe Forestiere et Industrielle de Belabo (Sofibel)
Societe Textile de Kisangani (SOTEXKI)
Union Financiere Pour Le Development De L'Economie Cerealiere (Unigrains)
Societe de Developpement Regional Antilles

STATEMENT OF THE CASE

The petition for certiorari now before the Court is the latest installment in a lengthy and factually complex barrage of litigation instituted by the petitioner, Rose Hall Limited (hereinafter "plaintiff" or "Rose Hall") in three separate jurisdictions. The transaction which underlies all of plaintiff's claims was the foreclosure sale of certain of plaintiff's Jamaican property by Chase Merchant Bankers Jamaica, Ltd. ("Chase Jamaica"), a Jamaican subsidiary of respondent, Chase Manhattan Overseas Banking Corporation ("CMOBC"). In this action, plaintiff alleged that the price obtained by Chase Jamaica in the foreclosure sale was inadequate and asserted several theories to hold CMOBC liable.

The dispute arose out of a speculative development scheme gone sour. In the mid-1960's, plaintiff, a Cayman Islands corporation, had invested in a large tract of undeveloped land near Montego Bay, Jamaica, which it hoped to develop into hotels, condominiums and other resort properties. In 1974 plaintiff borrowed $3,000,000 from Chase Jamaica, mortgaging 3,000 acres of the undeveloped land and pledging the stock of plaintiff's subsidiary (Rose Hall (H.I.) Ltd.) which owned a nearby hotel leased to the Holiday Inn chain (A-5 to A-6). Plaintiff immediately went into default on the loan (A-6).

Under Jamaican law, Chase Jamaica had the right to sell its security forthwith upon plaintiff's default (A-77), but it forebore from doing so for almost two years, relying on certain assurances by plaintiff which proved to be false. First, plaintiff assured Chase Jamaica that plaintiff's sole principal, John W. Rollins, whose net worth exceeded $54 million at the time (4920-27a), would personally guarantee the loan (DXC 271; TR 10,791-92). This guarantee was never given.[1] Second, plaintiff assured Chase Jamaica that it would

---

1. Chase Jamaica eventually was told that the guarantee "could not" be given (DXC 405 at 3-4; TR 10,791-92). Rollins initially claimed that his other bank obligations legally prohibited a guarantee (TR 3677).

soon effect a sale of the hotel to the Jamaican Government for $13 million that would permit Chase Jamaica to be paid $1.25 million on its loan if Chase Jamaica would agree to release its liens on the hotel to permit the sale (4370a, 4382a; DXC 356). Despite the fact that two-thirds of the loan would remain unpaid after this collateral was released, Chase Jamaica cooperated to accomplish the proposed sale (918a, 4367a). But while negotiations for the sale were underway, occupancy rates for the hotel plunged dramatically (see TR 13,207; DXC 963(2) at 25) and the hotel's income fell short of plaintiff's projections which had formed the basis for the proposed $13 million sale (2632-33a; see 4886a).[2]

The evidence below plainly demonstrated that plaintiff had picked an inopportune time to speculate in resort development in Jamaica. As noted by the District Court, conditions in Jamaica deteriorated rapidly after plaintiff began negotiating with the Government for a $13 million sale in 1975:

> During the spring and summer of 1976, political and economic conditions in Jamaica deteriorated. Under Prime Minister Michael Manley, leader of the People's National Party ("P.N.P."), the government moved to the left in foreign and domestic policy and created widespread apprehension, flight of capital, and political violence on the island. This culminated in the declaration of a national State of Emergency on June 19, 1976. As a result, tourism and resort development declined dramatically.

NOTES *(Continued)*

but Rose Hall abandoned that claim at trial after bank records subpoenaed by CMOBC in discovery proved the claim to be baseless (see TR 14,410).

2. The Government's negotiator, Mr. Matalon, determined that a condition of the purchase — that revenues be sufficient to support the proposed debt on the hotel (TR 7575, 11,026-27) — would not be achieved (3437a). In addition, the hotel's tenant, a subsidiary of Holiday Inns, Inc., made it known that it was an unhappy tenant (A-6 to A-7) and wanted to renegotiate its highly unprofitable lease (3436a).

Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., 566 F.Supp 1558, 1562 (D.Del. 1983).[3] A Jamaican court described conditions in 1976 in even starker terms:

> I have regard to the conditions then [in 1976] obtaining in the country so widespread and notorious that I can take Judicial Notice of them. Violence stalked the land, murders were commonplace, Public Opinion was outraged. Fear abounded.

The Gleaner Company Ltd. v. JBC and Ken Maxwell, Suit No. C.L. 025/1976 at 20 (Supreme Court of Judicature of Jamaica, Slip Opinion of July 26, 1982) (B-11).

Not surprisingly, plaintiff's proposed sale of the hotel fell through, and in late summer 1976 Chase Jamaica assumed principal responsibility for the sales efforts (A-7 to A-8). On the advice of plaintiff's Jamaican real estate experts, Chase Jamaica did not put the property up for auction (3575a, 3581a) but attempted to revive negotiations with the Jamaican Government, the only prospective buyer (3491a). After rejecting Chase Jamaica's overtures to sell the hotel even at a reduced price, the Government expressed its willingness to buy the hotel along with the land pledged to Chase Jamaica for $9.5 million, but only on condition that Chase Jamaica arrange for 154% financing of the purchase price (3457a). Chase Jamaica agreed. Having calculated the collateral to be worth only $8.3 million, Chase Jamaica considered the price offered by the Government to be more than adequate (2027-34a, 2044-54a, 2102a). And although the Chase Manhattan Bank, N.A. (Chase Jamaica's

---

3. This decline, which contributed to the worst economic depression in Jamaica's history (2559a), sent hotel prices plummeting to levels that appeared to be enormous bargains relative to earlier values. For instance, Ramada Inns, which had purchased the Royal Caribbean Hotel, located a short distance from the Holiday Inn, for $5,000,000 in 1972, sold it for $500,000 in 1977 (2409a). Another smaller hotel in Montego Bay with a value estimated at $2,000,000 in 1974 was boarded up and abandoned by its owner in 1977 and later sold for $20,000 (2372-75a).

corporate grandparent) had previously decided to stop lending any money to the unstable Government (3917-18a), it agreed to provide the financing because the Government's offer was the "only possible immediate solution to the Rose Hall problem" (3451a). A contract of sale was entered into in October 1976 although the sale did not close until November 1977 (A-7 to A-8).

In the fall of 1976 plaintiff brought a suit for damages in Georgia against Holiday Inns, Inc. ("Holiday Inns") and an action to enjoin the sale in Jamaica against Chase Jamaica (A-8-9).[4] After both actions failed, plaintiff brought the present suit against CMOBC, seeking to hold it liable for the alleged wrongs of Chase Jamaica.

CMOBC promptly moved for summary judgment (Dkt. 452). Although the District Court agreed that plaintiff's complaint failed to state any basis for holding CMOBC liable, plaintiff was permitted to amend its complaint to allege that the Edge Act (12 U.S.C. §§601 *et seq.*) required CMOBC to control Chase Jamaica's sale of the collateral. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F.Supp. 1139, 1154 (D.Del. 1980). At that stage of the litigation, plaintiff did "not take issue" with Chase Jamaica's status as a "separate and distinct entity" (*id.*), and three years of massive discovery followed with no assertion by plaintiff of any "fraud" by CMOBC. Less than two weeks before the beginning of trial, however, plaintiff was again permitted (over CMOBC's objection) to amend its complaint, this time to assert a veil-piercing theory based on a new allegation that Chase Jamaica had committed perjury in the Jamaican action (A-52 to A-54; A-131 to A-138).

A jury trial of the action consumed 81 trial days and generated voluminous evidence and legal submissions by the parties (A-3, A-5). During the trial, the District Court

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4. Plaintiff had blamed Holiday Inns, whose subsidiary was the tenant of the hotel, for the collapse of the earlier negotiations to sell the hotel to the Jamaican Government for $13 million. Plaintiff also joined Holiday Inns as a defendant in the present suit but has not sought this Court's review of the judgment below for Holiday Inns.

explicitly adopted a "plaintiff-favoring standard" in its rulings, expressing the hope that such an approach would avoid retrial in the event of a defense verdict (B-6 to B-7; A-92, A-109, n. 88). Pursuant to this approach, the District Court deferred until after the verdict a ruling on CMOBC's contention that one of plaintiff's theories — that CMOBC's liability could be premised on alleged perjury by a Chase Jamaica witness in the prior Jamaican litigation — should be dismissed for failing to state a claim and should not be permitted to go to the jury (A-23 to A-24).

The jury found that Chase Jamaica had obtained the best available price for the hotel company stock pledged by plaintiff to secure the loan (A-11 to A-12, ¶¶1, 6). But the jury concluded that plaintiff had suffered damage of $4,500,000 on the novel theory that Chase Jamaica "wrongfully" prevented plaintiff from bringing suit against Holiday Inns by selling the stock to the Jamaican Government (*id.*, ¶¶2, 6). In addition, the jury found that the land was worth $1,500,000 more than the $1,000,000 obtained by Chase Jamaica (*id.*, ¶¶1, 6), after having heard valuation testimony from plaintiff's expert which the District Court later recognized was "optimistic and speculative" and "irrelevant" to the value of the land in 1976 (A-125 to A-126).[5]

Regarding liability for the damages, the jury found that CMOBC did not control Chase Jamaica's sale of the collateral, notwithstanding the rebuttable presumption to the contrary imposed under the Edge Act by the District Court's instructions (A-12, ¶3). As to plaintiff's perjury theory, however, the jury found that Chase Jamaica "as a result of its

5. On the basis of an earlier version of the same inflated appraisal plaintiff initially had claimed compensatory damages of $72 million and punitive damages in the tens of millions of dollars. See 566 F.Supp. at 1581-83. Plaintiff's claim for punitive damages was dismissed by the District Court on the grounds that Jamaican law permits recovery of such damages only when the defendant is unjustly enriched by his conduct, and there had been no proof or even any allegation that Chase Jamaica or CMOBC had been unjustly enriched by the alleged wrongs here (810a).

control by CMOBC" had deceived the Jamaican court (*id.*, ¶4). On this basis, judgment was initially entered in plaintiff's favor. Thereafter, the District Court gave "the promised serious consideration of CMOBC's contention" that the perjury theory was legally groundless (A-24) and granted judgment notwithstanding the verdict in favor of CMOBC (see A-3 to A-52). Adopting the District Court's "thoughtful opinion" (A-2), the Court of Appeals affirmed this holding by a judgment order and denied rehearing. Plaintiff's petition for a writ of certiorari seeks review of that order.

SUMMARY OF ARGUMENT

1. The judgment below rests upon two *independent* grounds: first, as a matter of Jamaican law, a civil action for damages cannot be based in whole or in part upon alleged perjury in a prior judicial proceeding; and second, the factual record does not support the jury's finding that CMOBC controlled the alleged fraud in the Jamaican court. Neither ground presents a federal issue. Plaintiff's contention that federal law applies is belied by its concession in the Court of Appeals that the point is controlled by Jamaican law.

2. In the Court of Appeals, plaintiff abandoned its contention that Edge Act corporations are automatically liable for the acts of their foreign subsidiaries, and plaintiff may not renew that claim in this Court. Plaintiff's theory (a) runs against two cardinal principles of corporate law (limited liability and separation of ownership from management); (b) finds no support in the legislative history of the Edge Act; and (c) conflicts with the express terms of the statute itself.

3. Plaintiff's theory that CMOBC is liable for "stripping" Chase Jamaica of assets was neither submitted to the jury nor fairly presented to the District Court pursuant to Rules 49 and 50, Fed.R.Civ.P. The record contains no evidence that CMOBC ever controlled or received anything of value for the alleged "stripping." At all events, no federal issue is presented since the courts below did not reject any

federally recognized doctrine but simply found plaintiff's theory inapplicable under the particular facts of this case.

4. The judgment below is supported by independent grounds under Jamaican law. Plaintiff failed to prove by clear and convincing evidence that Chase Jamaica committed any fraud. Moreover, Chase Jamaica's sale of the land and corporate stock was entirely proper under applicable Jamaican law. Contrary to plaintiff's theory of recovery, Chase Jamaica was entitled to sell its collateral upon plaintiff's default and had absolutely no duty either to subdivide the mortgaged land for sale in lots, or to refrain from selling the pledged stock to help plaintiff sue Holiday Inns.

ARGUMENT

I. THE JUDGMENT BELOW WAS BASED UPON TWO INDEPENDENT GROUNDS — ONE OF JAMAICAN LAW AND ONE OF FACT — NEITHER OF WHICH MERITS THIS COURT'S REVIEW.

Only the third of plaintiff's three "Questions Presented" was fairly presented to the courts below. This was plaintiff's contention that CMOBC should be held liable based on the jury's findings that "Chase Jamaica, through its representations, as a result of its control by CMOBC, deceive[d] the Jamaican court into not enjoining the sale of the collateral" (A-12, ¶4). The courts below correctly rejected any liability based on this theory for two independent reasons: (1) under controlling Jamaican law a civil cause of action for damages may not be predicated in whole or in part on alleged perjury or misrepresentations in a prior proceeding, and (2) there was no evidence from which the jury properly could have concluded that CMOBC controlled the alleged misrepresentation in the Jamaican court (A-2; A-23 *ff*; A-45 *ff*).

The judgment below is supported by *both* grounds and plaintiff has supplied no reason for this Court to disturb it. First, this Court should not entertain plaintiff's complaint that the Jamaican law applied below is somehow inconsistent with "LONG-RECOGNIZED REMEDIAL POWERS

OF FEDERAL COURTS" (P 18; see also P 13, n. 4), since plaintiff conceded in oral argument below that the Court of Appeals should "apply Commonwealth law and not United States law . . . on this issue." (B-1). [6] "[A] challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 103 S.Ct. 2368, 2373, n.8 (1983). *A fortiori* there is no reason for this Court to grant certiorari on the foreign-law questions presented here.

The second basis for the judgment below was the *factual* determination that CMOBC did not control the alleged "fraud" in the Jamaican court. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Plaintiff's request that it do so here (P 26-28) should be denied. Indeed, "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).[7]

The Court should decline to review this factual issue for the additional reason that plaintiff has violated Supreme Court Rules 21.3 and 21.4 by appending to its 30-page petition 24 pages of its appellate briefs which unsuccessfully argued that CMOBC controlled the alleged fraud (P 26-27, n. 16; A-166 to A-190).[8] CMOBC resists the temptation to append the pages from its briefs below that flatly refute each of plaintiff's arguments on the matter and, instead, respectfully refers this Court to the trial court's opinion below which, on the basis of a painstaking review of the mas-

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6. For the District Court's analysis to the same effect, see A-25.

7. Here, having considered all the contentions raised by plaintiff (A-2), the Court of Appeals affirmed on the basis of the District Court's opinion which included a factual finding that CMOBC did not control the fraud (A-45 to A-52).

8. Circuit courts have deplored the same practice as a violation of Federal Rule of Appellate Procedure 28(g). *Katz v. King*, 627 F.2d 568, 575 (1st Cir. 1980); *Bobsee Corp. v. United States*, 411 F.2d 231, 234, n. 2 (5th Cir. 1969).

sive record, soundly rejects plaintiff's argument that there is any evidence from which a jury could have determined that CMOBC controlled the alleged fraud (A-45 to A-52).

As a last resort, plaintiff argues that the Court should abolish the generally recognized control requirement in veil-piercing cases[9] and permit a "damaged plaintiff" to sue any member of an affiliated group of corporations, ignoring their separate corporate entities altogether (P 28-30). There is no reason for this Court to consider this desperate and unprecedented proposition which plaintiff did not develop in the courts below. A case involving the Jamaican acts of a Jamaican corporation in supposed violation of commercial duties imposed by Jamaican law is not an appropriate vehicle for reconsideration of the federal theory of the corporate veil.

In short, this factually tedious action governed by Jamaican law presents no issues of importance to anyone but the parties themselves. Plaintiff's petition for a writ of certiorari should be denied. Supreme Court Rule 17.1; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 79 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

II. PLAINTIFF ABANDONED ITS MERITLESS "EDGE ACT" THEORY IN THE COURT OF APPEALS.

The District Court indulged plaintiff's Edge Act theory of liability far more than it deserved, instructing the jury (over CMOBC's objection) to presume under the Edge Act that CMOBC controlled the actions of Chase Jamaica unless CMOBC demonstrated otherwise (3127a). Notwithstanding that unjustified shift in the burden of proof, the jury found in response to Interrogatory 3 that CMOBC did *not* control Chase Jamaica's sale of the Rose Hall collateral (A-12, ¶3).

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9. *See, e.g.*, 1 Fletcher, *Cyclopedia Corporations*, §43.10 (perm.ed. 1983).

Of its 125 printed pages of briefing presented to the Court of Appeals, plaintiff devoted a scant few pages to its Edge Act theory, and in response to pointed questions at oral argument, abandoned the theory altogether in favor of the misrepresentation arguments based on Interrogatory 4 (B-1 to B-3):

> JUDGE GREEN: What about Interrogatory No. 3? Doesn't that cover all the other possible causes of action, which was answered no, that CMOBC did not control Chase's major decisions in any other regard?
>
> MR. KIRKPATRICK: Your Honor, that was related to Chase's major decisions with respect to the sale of the collateral.
>
> * * *
>
> JUDGE GREEN: But you're saying here that you should collect from CMOBC because of the collateral sale?
>
> MR. KIRKPATRICK: We should collect for the collateral sale.
>
> JUDGE GREEN: Yes.
>
> MR. KIRKPATRICK: Because of the deception of the Jamaican court into thinking that Chase Jamaica would be good for damages and the subsequent liquidation of Chase Jamaica.
>
> * * *
>
> JUDGE GREEN: Do you eliminate altogether Interrogatory No. 3 on the piercing theory?
>
> MR. KIRKPATRICK: Yes, sir.
>
> JUDGE GREEN: Because the answer to that is against you.
>
> MR. KIRKPATRICK: Yes, it is.
>
> JUDGE GREEN: And that covers every other theory except the deception theory.

MR. KIRKPATRICK: I would say it doesn't cover the piercing theory with an innocent misrepresentation.

JUDGE GREEN: What does it fail to cover?

MR. KIRKPATRICK: An innocent misrepresentation, something that wouldn't have been a cause of action in and of itself.

Having thus abandoned its Edge Act theory at oral argument, plaintiff also omitted this ground from its petition for rehearing to the Court of Appeals (B-4). This Court should not grant a writ of certiorari to consider an issue that plaintiff did not deem sufficiently important to press in the Court of Appeals. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970).

Plaintiff's Edge Act theory is, in all events, contrived and implausible on its face. It requires a finding that the Edge Act impliedly abrogated two basic tenets of the law of corporations: first "the fundamental concept that the corporation is a separate legal entity distinct from its stockholders;"[10] and second, the basic proposition that "the corporation inherently involves a separation of ownership (in the shareholders) and management (in the board of directors)."[11] Had Congress intended to depart from these principles in the case of foreign subsidiaries of Edge corporations, it surely would have done so in clear and unambiguous terms. As the courts below agreed, however, there is absolutely no indication whatsoever in the statute or its legislative history "that subsidiaries of Edge Act corporations should be treated any differently than subsidiaries of any

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10. Powell, *Parent and Subsidiary Corporations* §1 at 1 (1931).

11. Henn, *Handbook of the Law of Corporations* §188 at 363 (2d ed. 1970).

other corporation" (A-105 to A-106).[12]

Plaintiff does nothing to rebut the comprehensively documented rejection of its Edge Act theory contained in the opinion below (A-96 to A-120). On the facts, plaintiff relies on one writer's general perceptions about how Edge subsidiaries operated " 'for the most part' " eighteen years ago (P 10), ignoring the pertinent evidentiary record and the special verdict which establish that Chase Jamaica in fact operated independently in this case (A-12, ¶3). On the law, plaintiff quotes selectively from Federal Reserve Board regulations, omitting material portions which undercut its contentions.[13] As the uncontradicted testimony established below, the Federal Reserve Board has never taken the position that CMOBC should "control the affairs of its subsidiaries" (2267a). But even if, *arguendo*, CMOBC's failure to exercise control over Chase Jamaica somehow violated the

12. Plaintiff's theory that an Edge corporation is automatically liable for a foreign subsidiary's debt is inconsistent with the statute as written. The Edge Act limits equity participation by an Edge corporation in a foreign subsidiary to 10% of the Edge corporation's capital and surplus (or 15% if the foreign subsidiary is engaged in banking). 12 U.S.C. §615(c). As noted below, this section seeks to "diversify risks," and does not on its face "limit liability" (A-106, n.85). But the section would not operate to diversify risk if, as plaintiff contends, the Edge Act corporation were automatically liable to the full extent of its capital and surplus for all obligations of each of its subsidiaries. Section 615(c) can "diversify risks" only if the Edge corporation enjoys the normal shareholder's privilege of liability that is limited to the extent of its investment in each subsidiary. Thus, plaintiff's contention that CMOBC is automatically or presumptively liable for the debts of a foreign subsidiary is contrary to the express terms of the Edge Act.

13. Plaintiff quotes part of Regulation M, 12 C.F.R. §213.104(c) (1973-79) (P 9) in an effort to show that Edge corporations are required to supervise their subsidiaries in a way that precludes limited liability, omitting that part of the regulation which states that the system of records, controls and reports required to carry out such supervision is simply one "that will keep the bank's management informed of the activities and condition of its branches and subsidiaries" (see A-160). As the opinion below pointed out, "[s]uch supervision . . . is not tantamount to control. It simply serves an informational and regulatory purpose to ensure the financial health of the Edge Act corporation." (A-103).

Edge Act, the Federal Reserve Board has ample power to remedy the violation. See 12 U.S.C. §622.

Plaintiff does not advance its cause by citing 12 U.S.C. §632. That section "[o]f course . . . is jurisdictional," as plaintiff conceded below (Rose Hall's Response Brief on Appeal at 34). "The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce, not in the jurisdictional provision." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979). Indeed, pertinent cases decided under Section 632 make clear that it has no substantive effect of its own. The statute is simply "meant to give a federal forum to nationally chartered banks" and to establish a "federal choice of law rule" which, in this case, mandates the application of Jamaican law. *See Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (Venezuelan law governs the issue of an alleged fraud in Venezuela); *Citibank, N.A. v. Benkoczy*, 561 F.Supp. 184, 186, n.3 (S.D.Fla. 1983) (Haitian law governs any obligations under a Haitian contract of guaranty). Section 632 of Title 12 is not even part of the Edge Act and has no particular application to Edge corporations. *Travis v. National City Bank of New York*, 23 F.Supp. 363, 367 (E.D.N.Y. 1938). The statute simply will not support the burden plaintiff's novel theory places on it.

Plaintiff's abandonment of the Edge Act theory in the Court of Appeals, after its rejection by the jury and the District Court, lays the theory to a well-deserved rest which need not be disturbed by this Court.

III. PLAINTIFF'S "STRIPPING" ARGUMENT WAS NOT PRESERVED IN THE DISTRICT COURT AND LACKS IMPORTANCE OR MERIT IN ANY EVENT.

Plaintiff never requested a special interrogatory in connection with its allegation that CMOBC should be held liable for purportedly "stripping" Chase Jamaica of assets (P 12-17). Consequently, that claim was never submitted to

the jury. Plaintiff did not ask the District Court to make supplemental findings pursuant to Rule 49(a), Fed.R.Civ.P. to support such a basis of liability, nor did plaintiff move for a directed verdict or for judgment notwithstanding the verdict on this basis. Thus, when plaintiff raised the issue at oral argument, the Court of Appeals pointed out that the question before it was the alleged misrepresentation encompassed in Interrogatory 4 (B-1, B-2), not the broader theory of "inequity" that plaintiff had failed to preserve for appeal. The United States Court of Appeals for the Third Circuit, like this Court, does not address issues raised for the first time on appeal. *United States v. Riccobene*, 709 F.2d 214, 229 (3d Cir.), *cert. denied*, 104 S.Ct. 157 (1983), *citing Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976). By the same token, this Court should not grant a writ of certiorari to consider a claim which was not submitted to the jury and which plaintiff did not preserve under Rules 49 and 50, Fed.R.Civ.P. *See Tyrrell v. District of Columbia*, 243 U.S. 1, 6 (1917) (It is the duty of this Court to dismiss a writ of certiorari as improvidently granted where the writ involves a theory of liability which was neither submitted to the jury nor preserved for appeal).[14]

Plaintiff has attempted to create the impression that there is some dispute among the federal courts over the interpretation of the veil-piercing doctrine and has asserted that this doctrine needs "clarification" because the result below was different from the result in three cases cited by plaintiff (P 12).[15] It is mystifying that plaintiff seeks "clarification" of a doctrine the application of which, according

14. Even if plaintiff's failure to preserve the claim in the District Court could be overlooked, this Court in its discretion should deny certiorari since the point was not addressed in the opinion of the Court of Appeals. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975).

15. *Pepper v. Litton*, 308 U.S. 295 (1939); *Federal Deposit Ins. Corp. v. Sea Pines Co.*, 692 F.2d 973, 976 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 2089 (1983); *United Rubber Workers v. Great American Industries, Inc.*, 479 F.Supp. 216, 245-46 (S.D.N.Y. 1979).

to plaintiff, " 'depend[s] upon the circumstances,' " defies " 'any verbalization of the test in a mechanical manner,' " and requires that " 'each case must be considered on its own facts.' " (P 15, n. 6). A doctrine so closely tied to particular factual circumstances is not a likely candidate for doctrinal "clarification." Moreover, that different facts lead to different conclusions pursuant to the doctrine does not support any claim of a "conflict" of decisions among the circuits or within any one of them.[16]

On the particular facts of *this* case the courts below quite properly found that there was no stripping of assets that rendered CMOBC liable for its subsidiary's debts:

> Plaintiff's inflammatory label of "stripping the assets" obscures reality. Plaintiff does not dispute that CMOBC did not in any way profit or receive any assets from the "stripping" which in reality consisted of selling off Chase Jamaica's loan portfolio and paying off its non-contingent creditors, including other Chase entities. There is nothing remotely approaching fraud in a wholly owned subsidiary paying off creditors upon closing its business even though there is outstanding a contingent claim to be resolved at some future time via the vagaries of the litigation process.

(A-39-40). Indeed, there was not a shred of evidence in the record that CMOBC controlled the alleged stripping or received any benefit from it. CMOBC never received a dividend from Chase Jamaica, liquidating or otherwise (2263a). Neither jury nor court found that CMOBC was in any way involved with Chase Jamaica's payment of its non-

16. Plaintiff's own citation (P 14) shows that " 'siphoning of funds' " by the majority shareholder is as much a basis for veil-piercing in the Third Circuit as in the Fourth Circuit, the Southern District of New York or anywhere else. *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981). Thus the decisions cited by plaintiff are "really in harmony and not in conflict" and there is "no ground for . . . allowing the writ of certiorari to add to an already burdened docket." *Layne & Bowler Corp., supra*, 261 U.S. at 392-93.

contingent creditors when it closed its office, and plaintiff's casual reference to "CMOBC's liquidation of Chase Jamaica" (P 17), without so much as a record citation, is irresponsible.

IV. CERTIORARI IS NOT APPROPRIATE IN THIS CASE BECAUSE THE RESULT BELOW IS SUPPORTED INDEPENDENTLY BY THE RECORD AND BY PRINCIPLES OF JAMAICAN COMMERCIAL LAW.

"It is well accepted . . . that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 132, 137, n. 5 (1982); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). This is so even though the argument of appellee or respondent "may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *American Ry. Express Co., supra*, 265 U.S. at 435.

In the District Court and the Court of Appeals, CMOBC sought judgment notwithstanding the verdict not only on the basis of Chase Jamaica's status as a separate corporate entity but also because plaintiff had no valid claim against Chase Jamaica in the first instance (A-40 *ff.*, A-60 *ff.*, A-75 *ff.*). Plaintiff's "evidence" that Chase Jamaica committed "fraud" on the Jamaican court was found to be "scarce and contradictory" and "disquieting" by the District Judge, although in dicta he declined to overturn the verdict on this point (A-41-42, A-44-45). As a matter of law, however, evidence that is "scarce and contradictory" cannot meet the clear and convincing standard necessary to establish fraud under Jamaican law (see A-41, n. 33). Plaintiff thus failed to prove by a sufficient quantum of evidence that any fraud was committed by a Chase Jamaica employee or by anyone else.

Plaintiff's claim that Chase Jamaica breached its duties as a secured creditor was based on the following proposi-

tions which are commercially unworkable and totally untenable under Jamaican law:

> 1. A pledgee of corporate stock must embark upon major litigation before selling the collateral, if this is demanded by the debtor in default (A-60-61); and
>
> 2. A mortgagee of undeveloped land must subdivide and develop the land before selling it, even though the defaulting mortgagor was unwilling or unable to do so (A-75 *ff.*).

The District Court purported to derive these "duties" from Commonwealth precedent requiring secured creditors to act in "good faith" (A-61, A-76). But the secured creditor's duty of good faith in the disposition of collateral is nothing more than the obligation "not to cheat" the borrower. *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.*, [1971] 1 Ch. 949, 966 (C.A.). Upon default, the secured creditor has the right to sell his security immediately, even in a depressed market, and to prefer his own interests "as he sees them" to those of the mortgagor. *Id.* at 968-69.

Where, as the jury found here (A-12, ¶6(b)), the creditor sells pledged or mortgaged stock "at a fair and proper price," the defaulting debtor "has no cause of action in respect thereof," *Belton v. Bass, Ratcliffe and Gretton, Limited*, [1922] 2 Ch. 449, 466; Brown, *Personal Property*, §15.8 at 493 (3d ed. 1975). Thus in the Jamaican litigation between plaintiff and Chase Jamaica, the court rejected plaintiff's claim that Chase Jamaica had any duty to facilitate plaintiff's lawsuit against Holiday Inns. *Rose Hall, Ltd. v. Chase Merchant Bankers Jamaica, Ltd.*, Suit No. E 211 of 1976 at 12-13 (Supreme Court of Judicature of Jamaica, Slip Opinion of January 27, 1977) (B-8 to B-9).

Plaintiff's contention that Chase Jamaica had a duty to subdivide the 3,000 acres of undeveloped land for sale in lots is expressly negated by Section 106 of the Registration of Titles Act of Jamaica which provides that upon default the mortgagee "may sell the land mortgaged or charged, or

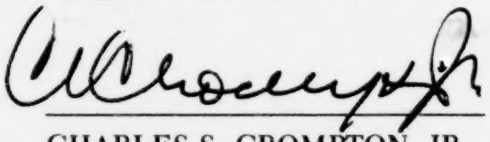
any part thereof, either altogether or in lots . . . and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby" (A-165). And only last year the Privy Council (the court of last resort for Commonwealth nations including Jamaica) reaffirmed the common law rule that "[t]he mortgagee is not . . . bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss." *Tse Kwong Lam v. Wong Chit Sen*, [1983] 3 All E.R. 54, 59, 64 (P.C.).

Since there are adequate, independent grounds under Jamaican law to sustain the judgment below, plaintiff's petition for certiorari should be denied.

CONCLUSION

For the foregoing reasons this Court should deny Rose Hall's petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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December 7, 1984

APPENDIX

EXCERPTS FROM TRANSCRIPT OF ORAL ARGUMENT IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (JULY 10, 1984; HIGGINBOTHAM, SLOVITER AND GREEN, JJ.)

* * *

[pp. 9-10] JUDGE HIGGINBOTHAM: But the interrogatory isn't stated as broadly as you have just suggested for the charge. The interrogatory, as I read it, was limited specifically to one event which occurred in the Jamaican court.

MR. KIRKPATRICK: Your Honor, that's exactly correct. It was indeed. The other elements or facts were not themselves in dispute and Judge Steel's charge to the jury on Interrogatory 4—

JUDGE HIGGINBOTHAM: Can you help me a little on that? You say the other elements were not in dispute. No one conceded fraud except for deceiving the Jamaican court. It seems to me that the fraud issue was disputed all the time by CMOBC.

MR. KIRKPATRICK: Oh, it was hotly contested. No question about that.

* * *

[p. 14] JUDGE SLOVITER: You agree, I gather, that we apply Commonwealth law and not United States law?

MR. KIRKPATRICK: Yes, your Honor.

JUDGE SLOVITER: On this issue.

MR. KIRKPATRICK: Yes, your Honor, I do. We have found no English authority which really considers this question of vicarious claim of the immunity. The American courts have, and they say the immunity — most of them at least — that the immunity is personal and cannot be vicariously claimed, and the Restatement speaks rather eloquently on the topic. And we say in those circumstances where there is no Commonwealth authority and there is a clear weight of authority in this country, it indicates what a common law court would do.

* * *

[pp. 16-17] JUDGE GREEN: What about Interrogatory No.

3? Doesn't that cover all the other possible causes of action, which was answered no, that CMOBC did not control Chase's major decisions in any other regard?

MR. KIRKPATRICK: Your Honor, that was related to Chase's major decisions with respect to the sale of the collateral.

JUDGE GREEN: Yes.

MR. KIRKPATRICK: And that does determine that the CMOBC, the parent, was not controlling the collateral sale. And we don't claim that it's responsible for that reason. We say that it becomes involved in the cause of action for sale of the collateral.

JUDGE GREEN: But you're saying here that you should collect from CMOBC because of the collateral sale?

MR. KIRKPATRICK: We should collect for the collateral sale.

JUDGE GREEN: Yes.

MR. KIRKPATRICK: Because of the deception of the Jamaican court into thinking that Chase Jamaica would be good for damages and the subsequent liquidation of Chase Jamaica.

* * *

[pp. 49-50] MR. KIRKPATRICK: Our legal position, Your Honor, was simply that it did not have to be a deception in the sense of something that would constitute a cause of action.

JUDGE SLOVITER: But that's not what's really before us. I mean, whatever it had to be, what we have before us is in your favor a holding, a jury finding, that there was deception and the question is given that deception what happens now.

MR. KIRKPATRICK: My only point, Your Honor, was that even if it hadn't been the deception but the court had been innocently misled, we would still have our piercing theory.

The other point is this: There is—

JUDGE GREEN: Is this—well, wouldn't you have a piercing—

MR. KIRKPATRICK: Sorry.

JUDGE GREEN: Do you eliminate altogether Interrogatory No. 3 on the piercing theory?

MR. KIRKPATRICK: Yes, sir.

JUDGE GREEN: Because the answer to that is against you.

MR. KIRKPATRICK: Yes, it is.

JUDGE GREEN: And that covers every other theory except the deception theory.

MR. KIRKPATRICK: I would say it doesn't cover the piercing theory with an innocent misrepresentation.

JUDGE GREEN: What does it fail to cover? 3—

MR. KIRKPATRICK: An innocent misrepresentation, something that wouldn't have been a cause of action in and of itself.

My final point is this—

JUDGE HIGGINBOTHAM: If you had won on Interrogatory No. 3.—

JUDGE SLOVITER: That's it.

MR. KIRKPATRICK: We would have won.

* * *

EXCERPTS FROM PETITION OF PLAINTIFF-APPELLANT ROSE HALL LIMITED FOR REHEARING UNDER F.R.A.P. 40 AND REHEARING EN BANC UNDER F.R.A.P. 35 DATED JULY 27, 1984

* * *

[p. v] CERTIFICATION

I, the undersigned attorney, express a belief, based on a reasoned and studied professional judgment, that this appeal involves four questions of exceptional importance, to wit:

(1) Whether equity has power to disregard the separate entity of a judgment-proof subsidiary corporation to circumvent a fraud, inequity or injustice, because when a corporation is failing or insolvent those who control it owe an equitable duty to all creditors, which they breach by preferentially paying or securing debts the subsidiary owes to themselves, their relatives or affiliates, and,

(2) Whether in such circumstances any immunity forbids equity from taking cognizance of the fact that a court was earlier led to withhold an injunction of impending wrongs against plaintiff, on the basis of deceptive representations that plaintiff would have an adequate remedy in damages against the subsidiary because of parent company support, and

(3) Whether the court below correctly applied foreign law as to the purported immunity, when 12 U.S.C. §632 provides the question is governed by "the laws of the United States," and

(4) Whether a party who wins a Rule 49(a) special jury verdict involving a theory subject to some legal bar, should be denied judgment on lesser included theories supported by the verdict and not subject to such bar.

* * *

[p. 15] MORRIS, NICHOLS, ARSHT & TUNNELL

[s] Paul Welsh

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July 27, 1984

EXCERPTS FROM TRIAL TRANSCRIPT

* * *

[p. 5434 THE COURT:] But if I am going to make errors on this case, I would rather make the errors in admitting evidence than by keeping evidence out. If I act erroneously in admitting evidence, the verdict can take care of that error, if it's a verdict against the plaintiff. And if it's for the plaintiff, I can have a look at it, and the Court of Appeals can have a look at it.

So that's kind of my point of view about this, not that I am going to let everything in without giving any consideration to it. But I will hear Justice Robinson when we come back.

(Luncheon recess taken.)

* * *

[pp. 6442-43 THE COURT:] This case has consumed, someone said, nine weeks, and has involved I think between six and seven thousand pages of the record, with hundreds of exhibits. And I had indicated once or twice before that—I remember I said once before, Mr. Reid, where you had motions for a summary judgment, and I said, well, I don't know whether I put it this way, but I better make mistakes in denying them rather than make mistakes in granting them, and I feel that way now. And the [defendants' motions for a directed verdict] will not be granted, but I can assure the litigants that when their motions for judgment N.O.V., if that should ever be required, very serious consideration will be given to those motions.

* * *

[pp. 15,446-47] THE COURT: Well, I haven't reached, as a result of these arguments, any conclusion as to what I am going to do. I am going to think about it. But I am going to say now what I said before. I think if I have too much of a question about what should be submitted to the jury, and I decide these close questions in favor of the plaintiff, then the defendants have a right to clear that up.

On the other hand, if I decide them in favor of the defendants, and the plaintiff doesn't get a verdict, then the

plaintiff—if I made a mistake in favor of the defendants, the plaintiff can try the case only after we go through this again.

I think I am right about that approach, and it's an approach I have had.

Anyway, I will consider what has been submitted.

* * *

EXCERPT FROM *ROSE HALL, LTD. V. CHASE MERCHANT BANKERS JAMAICA, LTD.*, SUIT NO. E. 211 OF 1976 (SUPREME COURT OF JUDICATURE OF JAMAICA, SLIP OPINION DATED JANUARY 27, 1977, pp. 12-13)

IN THE
SUPREME COURT OF JUDICATURE
OF JAMAICA

Suit No. E. 211 of 1976

Between

Rose Hall Limited
Rose Hall (Developments) Limited

Plaintiffs

And

Chase Merchant Bankers Ja. Limited
Rose Hall (H.I.) Limited

Defendants

Heard: October 26, 27, 28, 29

November 2, 3, 4, 22, 1976

Richard Mahfood, Q.C., and Lloyd Barnett, instructed by Clinton Hart and Company for plaintiffs.

Norman Hill, Q.C., instructed by Judah, Desnoes and Company for first defendant.

David Muirhead, Q.C., instructed by Judah, Desnoes and Company for second defendant.

* * *

[*Rowe, J.*:]

Complaint is made by the plaintiffs that [Rose Hall (H.I.), under Chase Jamaica's control] refused permission for the plaintiffs to bring an action against Holiday Inns in the name of [Rose Hall (H.I.)], for unlawful interference in the plaintiffs' negotiations with the Urban Development

Corporation. That refusal, taken by itself, or cumulatively with the plaintiffs' other complaints is in my view no evidence of bad faith on the part of the defendants. The defendants must perforce continue to do business with Holiday Inns and it would be inimical to the defendants' interests to be engaged in a lawsuit against Holiday Inns.

* * *

EXCERPT FROM *THE GLEANER COMPANY LTD. V. JBC AND KEN MAXWELL*, SUIT NO. C.L. 025/1976 (SUPREME COURT OF JUDICATURE OF JAMAICA, SLIP OPINION DATED JULY 26, 1982, pp. 1, 20-22)

IN THE
SUPREME COURT OF JUDICATURE

IN COMMON LAW

SUIT NO. C.L. 025/1976

BETWEEN THE GLEANER COMPANY LTD.
Plaintiff

AND JAMAICA BROADCASTING CORPORATION

AND JOHN MAXWELL
Defendants

Ronald Williams Q.C. (with him Leo Rhynie Q.C.) for Plaintiff.

Muirhead Q.C. (with him Shelton) for first-named Defendant.

Knight (with him Pickersgill) for second-named Defendant.

HEARD ON: Divers days in January, 1980, November, 1981 and March, 1982

JUDGMENT

Vanderpump, J.

The words complained of were used by second-named Defendant in a rambling discourse over first-named Defendant's radio on the afternoon of the 14th January, 1976. This ranged from the buying potential of money (that could only buy a coup), touched on the democratic process and what was happening in Chile, stressed the need to be alert and protect ourselves here. It then went on to men-

tion that morning's issue of the Plaintiff's newspaper, describing one of its headlines in choice language, and had it's high point in the assertion that Plaintiff was thereby involved in a conspiracy to destroy the Constitution of the country. To round it off second-named Defendant invited Plaintiff to sue him for libel! This has now come to pass.

* * *

I have regard to the conditions then obtaining in the country so widespread and notorious that I can take Judicial Notice of them. Violence stalked the land, murders were commonplace, Public Opinion was outraged. Fear abounded.

I have regard to the nature of this libel which imputed to the Plaintiff the commission of the criminal offence of conspiracy which had in itself the seeds of Treason Felony striking at the roots of government.

I am here concerned with the award of compensatory damages only, and this against two Defendants. The villain in the piece was certainly second-named Defendant. He initiated the libel and carried it through single-handed. Surely this is the conduct for which the Plaintiff should be compensated. Without him there would be no libel. First-named Defendant was the silent principal in the background. He was vicariously liable nevertheless for that conduct, as I hold that principle of Respondeat Superior applies.

* * *

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No. 84-760

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term, 1984

ROSE HALL LIMITED,

Petitioner,

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the Third Circuit

PETITIONER ROSE HALL LIMITED'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR CERTIORARI

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ARGUMENT[1]

I. THE FACT ISSUES AND JAMAICAN LAW ISSUES CMOBC RELIES UPON ARE NOT INDEPENDENT GROUNDS PRECLUDING REVIEW HERE, AND CMOBC'S ASSERTIONS ABOUT COMPLEXITY ARE OVERSTATED.

Respondent Chase Manhattan Overseas Banking Corporation ("CMOBC") does not come to grips with the substance of Rose Hall's petition, but it does diligently raise many peripheral and mistaken points. Thus, CMOBC says the Court will find this case "factually tedious" (CMOBC Br. 9), and tries to demonstrate and fulfill this prediction by rehashing many of its failed factual and legal contentions — all rejected as wrong and/or inapplicable by the jury and the courts below (CMOBC Br. 1-6, 16-18).[2]

CMOBC points to this Court's cases permitting an appellee to "rely upon any matter appearing in the record in support of the judgment," as if granting Rose Hall's petition would require this Court to review a welter of other questions resolved adversely to CMOBC by the jury and the courts below (CMOBC Br. 16). A court of appeals does have such a burden, but in the context of its discretionary certiorari power, this Court does not. This Court has jurisdiction to review CMOBC's additional issues if it sees fit, and discretion to deny such review entirely or to remand issues for further proceedings below. *Stern & Gressman, Supreme Court Practice* 483 (5th ed. 1978). Thus, a respondent's mere aggressiveness in rais-

1. Pages i-ii of Petition of Rose Hall Limited for a Writ of Certiorari contain the information required by Supreme Court Rule 28.1.

2. Since Rule 22.5 of this Court limits this brief to arguments CMOBC has first raised in its opposition brief here, Rose Hall does not here discuss its responses to CMOBC's failed contentions. However, it has strong responses to them, as the verdict and the Opinion below demonstrated by rejecting them.

ing side issues and/or meritless arguments need not be rewarded with success in defeating a petition.

Rose Hall's Question Presented No. 3 deals with the Opinion's unprecedented extension of the courtroom immunity (Rose Hall Petition pp. i, 18-30). Not only does CMOBC acknowledge that this question "was fairly presented to the courts below" (CMOBC Br. 7), but it nowhere tries to belittle the importance of the issue, nor does it even try to challenge the merits of Rose Hall's position (Id. at 7-9). All CMOBC says about this question is that it should not be reviewed because of two supposed independent grounds of decision below.

CMOBC is wrong as to both. First, CMOBC says that Jamaican law, which is English commonwealth law, governs the immunity here. CMOBC does not discuss the rulings below that "the liability of CMOBC, as a stockholder, for the wrongs of its subsidiary, is governed by the laws of the United States" (A-24) and that "the United States has a significant policy interest in the application of its law" as to "liabilities of Edge Act corporations" (A-137), nor does CMOBC even mention the Opinion's holding that "if one started with Rose Hall's statement of the [veil-piercing] issue . . . the *American* rule on witness immunity" applies, nor does CMOBC deny that the published Opinion, adopted by the court of appeals, thereby holds that under Rose Hall's asserted understanding of Rose Hall's claim, the *American* immunity rule "precludes this suit as presented" (A-34) (see Rose Hall Petition pp. 7, 13 n.4). Moreover, CMOBC's point is wholly technical, since, as this Court teaches, United States immunity law is the same as commonwealth immunity law (See Rose Hall Petition 13, n.4).

All CMOBC does is point to certain colloquy at argument in the court of appeals, which CMOBC describes as Rose Hall's concession "that the Court of Appeals should 'apply commonwealth law and not United States law . . . on this issue' " (CMOBC Br. 8). This colloquy, while imprecisely phrased, conceded only that if one ac-

cepts the statement of the veil-piercing issue urged by *CMOBC* and adopted in the Opinion — the mistaken characterization of Rose Hall's claim as one "for" fraud on the Jamaican court — one *therefore* applies commonwealth law. Obviously, there was no intention to concede away Rose Hall's position, adopted by the district court in the Opinion, that "if one started with *Rose Hall's* statement of the [veil-piercing] issue . . . the American rule on witness immunity" applies (A-34). Nor was there any intention to concede away Rose Hall's position, insisted on throughout, that Rose Hall's definition of its veil-piercing claim is right, and CMOBC's confused contention that Rose Hall's veil-piercing claim was a "cause of action *for*" the deception of the Jamaican court, is wrong (See Rose Hall Petition pp. 21-23).

Moreover, in Rose Hall's petition for rehearing, *after* the supposed concession, Rose Hall expressly told the court of appeals there was still before it the question "whether the court below correctly applied foreign law as to the purported immunity, when 12 U.S.C. §632 provides the question is governed by 'the laws of the United States' " (CMOBC Br. B-4), thus continuing, despite the supposed concession, to urge that United States immunity law applies.[3] The court of appeals nowhere pur-

---

3. The American and commonwealth immunity law are both the common law — they do not materially differ. Rose Hall therefore briefed its argument using authorities from both jurisdictions. For instance, Rose Hall's opening brief in the court of appeals said the district court's application of the immunity was "unsupported by American or commonwealth precedent," noting that "Rose Hall had asserted, and the trial judge had held, that United States law governs 'the question of [CMOBC's] liability for the wrongs of Chase Jamaica" (Rose Hall opening court of appeals Br. 25), and Rose Hall freely cited both American and English immunity authorities (Id. at 24-29). Similarly, Rose Hall's response brief discussed, in some detail, English cases Rose Hall viewed as favorable (Rose Hall court of appeals Response Br. at 14-17), and then argued that "the American [immunity] law is not material ly different from" a leading English case (Id. at 17-18).

ported to give the colloquy CMOBC invokes any significance broader than here explained; it adopted the Opinion, which, as explained above, expressly applied the American immunity rule, and none other, to Rose Hall's claim as defined by Rose Hall. Thus, if this Court adopts Rose Hall's plain and simple proposition that veil-piercing here does not constitute a cause of action "for" false courtroom statements (Rose Hall Petition pp. 21-23), United States law applies, and no Jamaican law issue need be decided to reverse. CMOBC's brief offers no answer to that simple proposition.

As its only other "independent" ground of the decision below, CMOBC relies on what it calls "the *factual* [emphasis CMOBC's] determination that CMOBC did not control the alleged 'fraud' in the Jamaican court" (CMOBC Br. 8) — referring to the Opinion's rejection of the jury's finding that CMOBC did control the deception of the Jamaican court. However, Rose Hall's petition expressly explains that this is not dispositive; control of the deception has nothing to do with Questions Presented Nos. 1 (Edge Act) and 2 (stripping, viewed in itself),[4] nor with Question 3 as presented (Rose Hall Petition p. 27, n. 16). And CMOBC wholly disregards Rose Hall's point that, if this Court did adopt one of the few analyses which might make CMOBC's control of the presentation to the

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4. As to stripping, CMOBC points to Rose Hall's reference to "CMOBC's liquidation of Chase Jamaica" as "irresponsible," being "without so much as a record citation" (CMOBC Br. 16) as if there were a question about CMOBC's involvement in the liquidation of its wholly owned subsidiary Chase Jamaica. As to the deception of the Jamaican court, the Opinion struggled over whether a CMOBC director named Mason was involved, on the obvious premise that if he were involved this would adequately support the jury's finding that CMOBC controlled the deception (A-45-52). As to the liquidation of Chase Jamaica, however, CMOBC conceded below that "it was Mr. Mason who ultimately made the decision to close Chase Jamaica" (Dkt. 770, p. 32).

Jamaican court dispositive, this Court could properly remand that issue to the court of appeals with appropriate instructions (*Ibid.*).

II. ROSE HALL FULLY PRESERVED ITS EDGE ACT ARGUMENT IN THE COURT OF APPEALS.

CMOBC recognizes that Rose Hall's court of appeals briefs duly urged its Edge Act argument, but it says Rose Hall "abandoned the theory altogether" at oral argument (CMOBC Br. 10-11). Not so; CMOBC simply misreads colloquy which had nothing whatever to do with the Edge Act argument. Before the argument, the court of appeals asked counsel to address the issues about Interrogatory 4 to the jury, involving whether the immunity barred veil-piercing in the context of the deception of a court — there was no discussion at argument about the Edge Act. CMOBC's interpretation of the colloquy disregards what was obviously meant, and is only tenuously consistent with what was said. Moreover, the court of appeals nowhere said it understood Rose Hall to concede the Edge Act argument and, to the contrary, it adopted the entire district court Opinion, which discussed and decided the merits of the Edge Act argument (A-95-112).

Rose Hall also made no concession of the Edge Act argument, by using the limited number of pages allowed on petition for rehearing, for other issues — issues the oral argument suggested were central and needed the attention. Rose Hall did not have to file a petition for rehearing at all to preserve its Edge Act argument, which it had duly briefed to the court of appeals.

III. ROSE HALL'S "STRIPPING" ARGUMENT INVOLVES IMPORTANT LEGAL QUESTIONS, AND WAS DULY PRESERVED IN THE DISTRICT COURT.

CMOBC says it is "mystifying that plaintiff seeks 'clarification' of a doctrine [veil-piercing] the application of which . . . requires that 'each case must be considered

on its own facts' " since "a doctrine so closely tied to particular factual circumstances is not a likely candidate for doctrinal 'clarification' " (CMOBC Br. 14-15). Actually, the courts below denied Rose Hall this sensitive analysis of the specific equities, by woodenly applying supposedly inflexible doctrines. For instance, CMOBC here urges the "generally recognized control *requirement* in veil-piercing cases," saying it is "desperate and unprecedented" for Rose Hall to suggest that equitable analysis *can* warrant disregard of entities absent the control CMOBC and the courts below mistakenly said was a prerequisite (CMOBC Br. 9). Similarly, CMOBC's assertions that "there was not a shred of evidence in the record that CMOBC controlled the alleged stripping or received any benefit from it" (CMOBC Br. 15), mistakenly treat those matters as doctrinal prerequisites to the disregard of entities, which they are not (Rose Hall Petition 28-30). These points are not factual but doctrinal. CMOBC's successful assertion of these supposed rigidities (which, while mistaken, have support in some authorities) merits this Court's review, because preserving the actual doctrinal flexibility of veil-piercing has nationwide practical importance.

CMOBC argues that Rose Hall "failed to preserve for appeal" its "broader theory of 'inequity' " (CMOBC Br. 13-14).[5] This is mistaken. The district court initially entered judgment for Rose Hall on the verdict, and in opposing CMOBC's motion for judgment notwithstanding the verdict, Rose Hall was called upon for the first time, to respond to CMOBC's immunity argument. In that setting, Rose Hall duly briefed and argued its broader argument emphasizing the representations to the Jamaican court and the stripping of Chase Jamaica, taken together, and did so again in the court of appeals.

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5. The district court's holding about this was *sua sponte*, and in the court of appeals CMOBC simply cited that holding, offering no argument to support it (CMOBC court of appeals Br. 26).

Rose Hall's petition specifically addresses this supposed failure to preserve the argument (Rose Hall Petition pp. 25-26, n.15), and CMOBC's brief does not directly dispute anything Rose Hall there says. Rather, CMOBC merely says Rose Hall did not request a special interrogatory, or ask for supplemental findings "nor did plaintiff move for a directed verdict or for judgment notwithstanding the verdict on this basis" (CMOBC Br. 14) — simply ignoring Rose Hall's point that such steps were quite unnecessary since, *inter alia*, Rose Hall was *defending* its judgment based on the verdict *as given*.

CMOBC cites no authority that Rose Hall had to do those things, and it plainly did not. Rule 49(a) provides that a party who allows the questions to the jury to omit an issue waives only "his right to a trial *by jury* of the issue so omitted," not its merits; the rule expressly says the court may make a finding on such omitted issues or "shall" be deemed to have done so. The verdict may thus be augmented from the record, and the judgment may also be based on conclusions which are not the jury's finding, but which follow from something the jury did find. *See J. C. Motor Lines, Inc. v. Trailways Bus System, Inc.*, 689 F.2d 599, 602-03 (5th Cir. 1982); *Hudson Rug Refinishing & Cleaning Corp. v. Prime Manufacturing Co.*, 115 F.2d 615, 618-19 (7th Cir. 1940). It follows that a verdict winner's right to make legal arguments opposing a motion for judgment n.o.v., does not depend on having sought jury instructions about them, or on having moved for a directed verdict about them, or even on having previously asserted them at all.[6] Suppose CMOBC

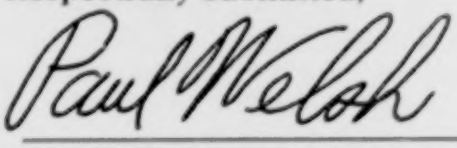
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6. See *International Nikoh Corp. v. H. K. Porter Co.*, 358 F.2d 284, 289-90 (7th Cir. 1966) (Plaintiff pleaded fraud but failed to prove it: unjust enrichment relief granted); *Glen Falls Indemnity Co. v. Golden*, 148 F. Supp. 41, 43 (D.C.D.C.), *aff'd*, 250 F.2d 769 (D.C. Cir. 1957) (same) (Holtzoff, J.); *Henry v. United States*, 424 F.2d 677, 679 (5th Cir. 1970) (plaintiff's False Claims Act theory failed; relief under lesser fraud standard "granted even though not specifically demanded by the pleadings"); Cf. *New Amsterdam Cas.*

had not moved for judgment n.o.v., but immediately appealed Rose Hall's judgment. As CMOBC itself here argues in a different connection, in such an appeal Rose Hall could have relied "upon *any matter appearing in the record* in support of the judgment" (CMOBC Br. 16). It follows that Rose Hall should have been given at least the same latitude to defend its judgment against CMOBC's motion for judgment n.o.v., and that the courts below gravely erred in holding otherwise.

Indeed, the Opinion's *sua sponte* waiver theory, while subsidiary to Rose Hall's Question Presented No. 3, is itself an important question of practice warranting certiorari. The holding below that a Rule 49(a) verdict winner can be mechanically denied the right to modify or refine its position in response to an adversary's argument, newly submitted on motion for judgment n.o.v., is novel, is inconsistent with the policy of the Rules favoring decision of the merits, and is of general importance.

Respectfully submitted,



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December 17, 1984

NOTES *(Continued)*

Co. v. Waller, 323 F.2d 20, 25 (4th Cir. 1963) (Plaintiff's theory failed; relief granted on different theory "disclaimed by the plaintiff when it sought the whole loaf").